Brief of Dickinson for

Filed Nov. 25, 18

Supreme Court of the United States

ABSALOM BACKUS, JR., and A. BACKUS, JR., & SONS, Plaintiffs in Error, vs. THE FORT STREET UNION DEPOT COMPANY, Defendant in Error.	Error to Supreme Court of Michigan.

Brief for Plaintiffs in Error Contesting the Motion to Dismiss Writ of Error for Want of Jurisdiction.

DON M. DICKINSON,
Counsel for Plaintiffs in Error.

DETROIT:
John F. Eby & Co., Printers.
1885.

INDEX.

Supreme Court of the United States.

ABSALOM BACKUS, JR., and
A. BACKUS, JR., & SONS,
Plaintiffs in Error,

vs.

THE FORT STREET UNION DEPOT
COMPANY,
Defendant in Error.

Error to Supreme Court of Michigan.

Brief for Plaintiffs in Error Contesting the Motion to Dismiss Writ of Error for Want of Jurisdiction.

We insist at the outset that a clear understanding of the federal questions presented in the record cannot be had upon a consideration of the meager portion of the exceptionally large original record printed on this motion, and we are unwilling to proceed with the argument, even of the questions of jurisdiction, without the printing of the record to the extent of what would be required by the rules and practice of this court for a hearing on the merits.

Owing to the grave character of the questions involved, as well as to the importance of the interests at stake, and to the distinctions between many of the federal questions submitted on

this record, from any ever before passed on by this court, up to the last case submitted to it at the October term of 1894, and decided, we are extremely desirous of being heard orally, even upon the questions of jurisdiction raised on this motion.

We proceed, however, to submit our views upon the motion record as printed, but it will in the discussion appear how defective that record is on some of the most important questions presented. We shall present our views with exceptional fullness on the motion, because of the efforts often made to invoke this jurisdiction, for various reasons, on untenable or extremely doubtful grounds.

On the motion record itself, enough appears to sustain the jurisdiction of this court, and our right to be heard on the merits. We will show from it that the title, right, privilege or immunity under the constitution of laws of the United States, set up by us, was specially set up in the highest court of the State of Michigan in which a decision could be had, and that the decision of that court was against the title, right, privilege or immunity so set up or claimed; and that wherever the questions are such that they should also have been raised in the *lower* courts of the State, they were so raised.

It will appear that the title, right, privilege or immunity

was specially set up or claimed at the proper time and in the proper way.

Miller vs. Texas, 153 U. S., 535.
Morrison vs. Watson, 154 U. S., pp. 111-115, and cases cited.

That the rights on which we rely were called to the attention of the State court in a proper way, and that the decision of the court was against the rights claimed.

Hoyt vs. Sheldon, 1 Blatchf., p. 518.
Maxwell vs. Newbald, 18 How., pp. 511-515.

That it appears by the record, by clear and necessary intendment, that the federal questions were directly involved, so that the State court could not have given judgment without deciding them; that definite issues as to the possession of the rights were distinctly deducible from the record, and were necessarily disposed of adversely by the decision of the State court.

Powell vs. Brunswick County, 150 U. S., p. 403.

That in this case, the federal questions were fairly presented in the record, and their decision necessary to the determination of the case; and that although the decision of the State court avoids all reference to them, yet that court rejected our claims for federal protection, and hence the decision was as much against our rights within the meaning of Section 709 of the Revised Statutes of the United States, as if the claims had been specifically referred to in the opinion and the rights directly refused.

Chapman vs. Goodnow, 123 U. S., 540.

And to the same effect:

Chicago Ins. Co. vs. Needles, 113 U. S., 574.
Murdock vs. Memphis, 20 Wall., 636.
Minneapolis vs. Bachelder, 1 Id., 109.
Brown vs. Colorado, 106 U. S., 95.

In Arrowsmith vs. Harmoning, 118 U. S., 194, no mention was made of the federal question in the opinion by the State court. The same is true of the opinion of the State court in this case, *although there was presented in the lower State court, and in the Supreme Court of the State, no other questions whatever, as will be seen hereafter, save these two:*

(1) That the proceedings were void from their inception, because in and by them the plaintiffs in error were denied the equal protection of the laws by the State of Michigan, in violation of Section 1, of Article XIV of the Constitution of the United States; and (2) that in and by the said proceedings, including the seizure of their property, the plaintiffs in error had been deprived of their property without due process of law, in express violation of said Section 1, of Article XIV of the Constitution of the United States.

It is even well established that the jurisdiction attaches, if the federal question is raised, *even if it should be a frivolous question.*

Hall vs. Johnson, 15 Wall., 393.

In the brief of the counsel for the motion, he endeavors to show that the Supreme Court of the State did not err in its

decision. Possibly this would do in an argument on the merits, but to obtain jurisdiction here, it is not necessary to show that the Supreme Court of the State erred.

Firman vs. Nichol, 8 Wall., 44.
Hartmann vs. Greenhow, 102 U. S., 672.

Indeed, in the latter case there is an affirmance by the Supreme Court of the State on an equal division of that court, yet the jurisdiction to come here was affirmed.

It is impossible to read this record, showing that in the lower State court and in the Supreme Court we were there solely to invoke this jurisdiction and the protection of the Constitution of the United States, and then read the rulings and opinions of both State courts, and avoid the conclusion that both were written under the mistaken assumption that our right to come here would be dependent upon the fact whether our claims of federal protection were referred to or passed upon in those opinions.

Of course, condemnation cases are suits within the meaning of Section 709 of the Revised Statutes.

Kohl vs. U. S., 91 U. S., 375.

And a "final judgment" from which a writ of error *may* come here from the court of last resort may be an affirmance of the proceedings below.

Mower vs. Fletcher, 114 U. S., 127.
Bostwick vs. Brinkerhoff, 106 U. S., 3.

Although it may also come here on other questions raised in the State court of last resort.

There is one other rule within which we must bring ourselves, in so far as we claim the jurisdiction on the affirmance of the rulings of the lower court by the court of last resort of the State.

The rule in such cases is laid down in Spies' case, 123 U. S., pp. 131-181, as follows:

"To give us jurisdiction under Section 709 of the Revised "Statutes because of the denial by a State court of any title, "right, privilege or immunity, claimed under the Constitution "or any treaty or statute of the United States, it must appear "on the record that such title, right, privilege or immunity was "specially set up or claimed at the proper time in the proper "way. To be reviewable here, the decision must be against the "right *so set up or claimed. As the Supreme Court of the "State was reviewing the decision of the trial court*, it must "appear that the claim was made in that court, because the "Supreme Court was only authorized to review the judgment for "errors committed there, and we can do no more. This is "not, as seems to be supposed by one of the counsel for the "petitioners, a question of a waiver of a right under the Con-"stitution, laws or treaties of the United States, but a question "of claim. If the right was not set up or claimed in the proper "court below, the judgment of the highest court of the State "in the action is conclusive, so far as the right of review here "is concerned."

Now, in this case we show, even by this motion record, that at the inception of the case, and at every stage of it, we rested our entire defense upon grounds, as specifically stated in writing, and at various stages orally, at the beginning, at the close, and intermediately, in the court below—"specially set up" (158 U. S., p. 183)—that all the proceedings were void, and the plaintiffs in error entitled to immunity under the above provisions of

the Constitution of the United States—specifying those provisions.

See motion, Record, pp. 31-32, Reason 1, and the specifications under it, page 35, No. 2. Orally, see p. 45, p. 49 at close, p. 52, p. 54 top, p. 57, No. 18.

The same positions were fully presented in the application for certiorari. See motion record, p. 84 top, 85 bottom, and pp. 87-88. Also specifically in the assignment of errors in the State Supreme Court, p. 92.

(We shall presently see that the counsel for the defendant in error is mistaken in his statement of practice on certiorari and assignments of error, and in his citation of authorities on that point.)

But aside from the jurisdiction claimed on affirmance within the rule in the Spies case, other federal questions invoking the protection of the Federal Constitution, and this jurisdiction, were regularly made on the original action of the Supreme Court itself, and, too, the seizure on execution of the property of the plaintiffs in error subsequent to the judgment of the State court was regularly and specifically challenged as a seizure without due process of law, in violation of the said article and section of the Constitution of the United States, and that question went up on certiorari, and was fully presented and argued in the Supreme Court itself, but these specific federal questions will be enumerated later, and the method of their presentment pointed out.

The following will be a sufficient statement of the case as a premise under which we may submit to the court how the federal questions arose, and how they were applicable.

The plaintiffs in error owned and managed a large plant within the City* of Detroit, for the manufacture of very fine decorations and artistic finishings in wood made from native and foreign timber. It consisted of the mill, or factory proper, at one place, of a reception and store-yard for raw material, consisting of about seven acres, a short distance away from the mill, and of a large seasoning house, also situated a short distance from the mill, but in a different direction

They had been established for many years, and they showed that their net profits in their business ran from twenty-five thousand dollars per annum, the minimum, to seventy-five thousand dollars per annum, the maximum.

They claimed before the railroads of the defendant in error were built, that the effect of their proximity in taking their front for four great trunk lines of road, would destroy their peculiar business entirely.

That the proposed "taking" by the railroads would also cut their plant in two, i. e., separate their factory from the other parts of their plant, as above stated, and so damage them seriously by interfering with access, etc. And they claimed to have demonstrated in the present record, without contradiction, that since the roads of the defendant in error had been constructed, the effect had been as expected, to completely destroy their peculiar business above described.

They contested the railroad's application to take the property on the ground of public necessity, and upon that question, as well as upon the amount of compensation to go to them, if the jury should find the necessity, a jury disagreed, and was discharged. A second trial was had, in which a jury found the necessity, and assessed the damages to be paid.

*A specific provision of the State Constitution applies to cities.

A trial judge* of the State Circuit Court—the highest nisi prius court—assumed to set aside that verdict, and order a new trial on the application of the railroad company. The Supreme Court of the State thereupon, after full argument, by unanimous judgment delivered by the then chief justice, granted a peremptory mandamus, setting aside the order for new trial as beyond the power of the trial judge.

Backus vs. Gartner, 89 Mich., p. 209.

Then the railroad companies paid the plaintiffs in error the amount of the verdict unconditionally; but subsequently took an appeal to the Supreme Court, and pending the appeal, took possession of the property (without permission), fully constructed their viaducts and railroads, and in every way went through the "taking" of what their petition had prayed for, and proceeded to operate their roads to the fullest extent of enjoyment of possession, which they have continued to do.

The property of the plaintiffs in error was the most valuable property with which the railroad company had to contend. The plaintiffs in error claimed that through the cry for public improvements, the courts deprived them of the protection of every guaranty to the citizen provided in the State Constitution in such cases, and of the safeguards of every provision of law accorded to other citizens, and in all this discriminated against them in order to force through an affirmative decision by a jury on the question of necessity, and to prevent payment to the plaintiffs in error of just compensation, which would be very large, for the taking of their property and injury to their business.

The Supreme Court of the State, notwithstanding the decision in the mandamus case, and after the chief justice, who delivered the opinion in that case, had retired from the bench, heard the appeal above referred to, and as the records here show, without ordering a rehearing on the questions disposed of in the mandamus case, and with the fact before it that the railroad had

*The same judge acted in all these trials, and is no longer on the bench.

taken the property, and was operating its road over it, set aside the award of compensation on the second trial, but affirmed the simultaneous award of the same jury on the question of necessity, and reversing itself in the decision on the mandamus case, sent the case back for a trial on the question of compensation only, so that the trial judge below was left with authority to grant other and unlimited new trials, which the Supreme Court itself could not do under constitution or statute.

Union Depot Company vs. Backus, 92 Mich., 33.

Thereupon the same trial judge proceeded to order a new jury, while the railroad was in full possession and enjoyment by way of a complete "taking," as above stated, operating its roads as fully as if the condemnation proceedings had reached a finality in its favor.

Thereupon the plaintiffs in error at once began to invoke the guaranties of the Constitution of the United States for their protection. The new trial was confined to the question of compensation, and that compensation, by the methods shown by the record, was reduced; and the trial judge entered judgment as in a court of record at common law, against the plaintiffs in error for the difference, and ordered execution to be issued thereon.

Executions were issued, and personal property of plaintiffs in error of the value, as shown by this motion record, of one hundred ten thousand dollars ($110,000) was taken by the sheriff under such executions.

Of course, the proceedings were not in accordance with the course of the common law, and the statute under which they were

taken, even if constitutional in this regard, did not provide for any judgment against the plaintiffs in error in terms (they were not the "party appealing"), and did not provide for any executions against them in any event.

Thereupon the petition was made for a writ of certiorari to the Supreme Court, setting up the federal questions as they had arisen and been presented below, and also setting up the subsequent proceedings of the trial judge in entering the judgment, and issuing the said executions. Also setting up by respectful allegation specifically wherein the trial judge had violated the XIV. Amendment to the Constitution of the United States, and wherein the Supreme Court itself had violated the Constitution of the United States in the premises.

In Michigan the writ of certiorari is confined to cases raising questions of jurisdiction, and to cases of imprisonment. The facts, or mere errors in ruling, do not come up for review, nor do mere irregularities.

Ishpeming vs. Maroney, 49 Mich., 226.
Dunlap vs. Railroad, 46 Mich., 191.
Railroad vs. Backus, 48 Mich., 582.
Grand Rapids vs. Weiden, 65 Mich., pp. 572-576.

Now, in this case, the writ of certiorari was allowed, and the brief and argument of plaintiffs in error wholly confined to these three questions as *jurisdictional* ones.

FIRST.

(1) By the constitution and laws of the State, the proceedings were void.

(2) By the constitution and laws of the State, *as that Constitution and those laws had been before and since uniformly construed by the Supreme Court of the State itself as to all other citizens, than these plaintiffs in error*, the proceedings were void, and consquently :

SECOND.

The proceedings were utterly void under the Constitution of the United States (Section 1, Art. XIV.) because in and by the proceedings, including the action of the Supreme Court itself, the plaintiffs in error, being persons within its jurisdiction, had been denied by the State of Michigan the equal protection of its laws.

THIRD.

That the proceedings were utterly void as repugnant to Section 1, of Article XIV. of the Constitution of the United States, because

(1) The property of the plaintiffs in error had been taken under them, and that from beginning to end of the third trial, so-called, the proceedings were not due process of law.

(2) The executions under which the property was seized was not due process of law.

The Specific Federal Questions, their Application to the Record, and how Raised.

I.

THE DISCRIMINATION AGAINST THE PLAINTIFFS IN ERROR.

(ONE.)

It may be regarded as conclusively settled that the provision of the Federal Constitution, guarantying the equal protection of the laws of a State to any citizen, applies with as much vigor and effect to the judicial branch of the State government, as to the legislative or executive, and that the authorities construing the provision as to legislative action apply with equal force to judicial action.

Virginia vs. Rives, 100 U. S., 313.
Neal vs. Delaware, 103 U. S., 370.
Lavin vs. Bank, 18 Blatchf., 17.

As stated in the case of Missouri vs. Lewis, 101 U. S., 22:

"The clause in question means that no person or class of "persons, shall be denied the same protection of the laws which "is enjoyed by other persons or classes in the same place and "under like circumstances."

And in Hayes vs. Missouri, 120 U. S., p. 68, it was said:

"The fourteenth amendment to the Constitution of the United "States does not prohibit legislation which is limited either in "the objects to which it is directed, or by the territory within

"which it is to operate. It merely requires that all persons "subjected to such legislation shall be treated alike, under like "circumstances and conditions, both in the privileges conferred "and in the liabilities imposed."

See also Barbier vs. Connoly, 113 U. S., p. 27.

In Caldwell vs. Texas, 137 U. S., 692, it was stated:

"No State can deprive particular persons, or classes of per- "sons, of equal and impartial protection under the law, without "violating the provisions of the fourteenth amendment of the "Constitution."

We submit in passing that this court would not have dismissed the case of Marchant vs. Pennsylvania Railroad, 153 U. S., 383, for want of jurisdiction, had a motion been made to do so, because it did clearly appear that the protection had been claimed properly in the State court, as it has been in this case, on this very clause of the Constitution we here discuss.

There the merits were gone into, and it was found upon the record there presented that the Supreme Court of Pennsylvania had not, as a matter of fact, discriminated.

In that case, this court said:

"We are unable to see any merit in the contention that the "Supreme Court of Pennsylvania, in distinguishing between the "case of those who, like Duncan, were shut off from access to "and use of the street by the construction thereon of the elevated "railroad, and the case of those who suffered, not from the con- "struction of the railroad on the street on which their property "abutted, but from the injuries consequential on the operation "of the railroad, as situated on defendant's own property, thereby "deprived the plaintiff of the equal protection of the laws. The

"two classes of complainants differed in the critical particular "that one class suffered direct and immediate damage" * * * "and the other class suffered damages which were consequentiai."

But we shall show, when we come to the merits, that the discrimination here is made against the plaintiffs in error, *in the construction* of the Constitution of the State, which applies to all citizens alike in its guaranties. This is a discrimination against persons, not only by depriving them of the protection of the Constitution of the State, *but also in discriminating against them by applying an exceptional construction of that Constitution to them, and withholding from them the uniform construction of the same clauses of the Constitution accorded for the protection of all other persons, by the uniform decisions of the State court itself.*

Of course, the construction of the Constitution of the State is for the court of the State, and possibly in all cases is binding on this court, and there can be no review here of its construction of its domestic laws, fundamental or other; but in this case, it is alleged, and we shall present to this court, that the uniform construction of the clauses of the Constitution in question by the State court itself in many, and in an unbroken line of judgments; and then we propose to show as a federal question that the benefit of that construction has been denied to these particular citizens, *and denied to them only.*

In this branch of the case, too, we need not appeal to the doctrine of *stare decisis*, because we show by the record, and by the judgments of the Supreme Court of Michigan, that it

has not, as the counsel for the defendant in error suggests, changed its mind, or changed its construction. But it has refused to apply the uniform construction for the benefit of these plaintiffs in error. That is one of the specific questions raised on this record.

To illustrate. Section 15 of Article XV. of the Constitution of this State—"Corporations"—provides:

"Private property shall not be taken for public improvements "in *cities* and villages without the consent of the owner, unless "the compensation therefor *shall* FIRST *be* DETERMINED *by a jury* "*of freeholders*, and actually paid or secured in the manner "provided by law."

This provision of our Constitution, as held over and over again by our own Supreme Court, means just what it says: that the question of how much compensation shall be paid, shall be *ended—"determined"*—finally, before any possession can be taken, even by order of a court; and that if any statute provides for an earlier taking, by any construction, it would be unconstitutional.

Now, on this record, it is seen that under the ruling of the Supreme Court, the railroad company went into full possession, and was operating its four roads as fully and completely as possible *long before the plaintiffs in error were ordered to go to trial on the last hearing on the amount of compensation.*

The late Mr. Justice Campbell, in Railroad Company vs. Chese-

boro, 74 Mich., 469, stated the doctrine and quoted the uniform authorities up to that date, where he said:

"No court has the right to divest possession in advance of "condemnation, *or to legalize it.*" * * * * * "The prin- "ciple is elementary."

And the learned justice cites the cases.

Referring to this provision of the Constitution, in Marquette, etc. R. R. vs. Probate Judge, 53 Mich., p. 226, the court, by Mr. Chief Justice Champlin, states:

"Compensation is a constitutional condition of such taking, "and it can only be lawful when the necessity of the taking, as "well as the measure of compensation, has been *determined* in "a legal way." (Sheldon vs. Kalamazoo, 24 Mich., p. 386.) "The necessities of the corporation for the immediate use of "the land for the purpose of constructing its road are not suf- "ficient to nullify these constitutional safeguards to the rights "of private property. If they may be ignored in one case, under "the plea of necessity, they may be in all, and the railroad com- "pany may proceed to seize upon private property and construct "its road, and leave the questions of the necessity of the taking, "and the compensation to be determined, at its leisure."

Referring to the statute itself, which is set out in the learned counsel's brief, the court of last resort in Michigan has repeatedly said that it was borrowed from some other State, not having similar constitutional limitations on legislative power.

For instance, Mr. Justice Campbell said of it, in Toledo vs. Dunlap, 47 Mich., pp. 456-461:

"This statute is evidently framed in accordance with the laws "of some other States, where the judicial power is not parcelled "out as it is here; and some complications have been caused by "this practice which introduce difficulties. We had occasion in "the case of Michigan Air Line Railway vs. Barnes, 44 Mich., "p. 222, to point out some of these difficulties. It is greatly to be

"regretted that this species of legislation has been so very care-
"lessly framed."

The same learned judge said in the case of Paul vs. The City of Detroit, 32 Mich., p. 109, of these constitutional provisions, that "they are not found in constitutions generally, and were never "known in Michigan until the adoption of the Constitution of "1851."

And again, in Railroad Company vs. Cheseboro, 74 Mich., 466, of this statute, that it was "borrowed from some other region."

But even the statute set out in the brief here of the opposing counsel, does not assume to confer authority to take possession pending appeal. We have seen that if it had made any express provision, it would be held unconstitutional and void, so far as that is concerned, in the State of Michigan, according to the authorities construing our constitutional provisions.

The provision italicized in the counsel's brief, at page 7, has reference only to the *final conclusion of the proceedings*, as it provides upon payment and taking possession for the clear and final passage of the title. The provision italicized at the top of page 8 does not authorize the taking of possession pending appeal, but does *imply* that the money itself may have been paid over.

In this case (as the record in this case will show, but it is not printed on the motion record), the payment was unconditional

at the time it was made, and no claim of possession was made or admitted.

Possession, even without title, is "property" within the meaning of the Constitution of the United States, and requires "due process of law" to take it from another.

Marshal vs. Knox, 16 Wall., pp. 551-557.
2 Hare's Am. Consti. Law. Lecture XXXVII, p. 823.

Possession, even without the appropriation of title, before condemnation and the ***determination*** finally of compensation, cannot be legalized or enforced under our constitution pending appeal.

If the question of compensation then shall not have been finally ***determined***, then it is plain sophistry to say that under the Constitution, the corporation seeking to take property could go through the form of tentative payment as a mere device to get around the constitutional provision, and then go through the form of a trial for the sole purpose of ***refixing and redetermining*** the compensation, by the use of the Constitutional and statutory proceedings for condemnation, merely to recover back the money paid. The suggestion would be grotesque, if the subject were not so grave, in thus dealing with the Bill of Rights.

The defendant in error thus secured everything sought by the proceeding for condemnation—a full and complete taking before the compensation was finally "determined," by the trick of the form of payment required as a prerequisite by the Constitu-

tion, and then was permitted by the Supreme Court to try to get his money back in the form of a proceeding for condemnation.

We submit that one of the most substantial and emphatic guaranties of the fundamental law cannot be got around in that way.

It is a question, not of legislation or statute law, but of the governing and higher law of the Constitution, as construed by the State court itself.

THE NEW YORK AUTHORITIES.

It is true that the Michigan *statute* in question is largely borrowed from New York, but imports a jury, with some other very clumsy additions; *it is not true, however, that the New York practice and authorities are in point, for the simple reason that the provision of the New York Constitution, under which their railroad law is framed, radically differs from ours in every essential on which we raise questions on this record.*

The New York Statute is framed under the following Constitutional provision of the Constitution of 1846, Article I., Section 7:

(See General Statutes of New York, Blatchf. Edition, 1829-1851, Appendix, p. IV.)

"When private property shall be taken for any public use, "*the compensation to be made therefor, when such compensation* "*is not made by the State, shall be ascertained by a jury, or by* "*not less than three commissioners appointed by a court of* "*record, as shall be prescribed by law.*" *

*The remainder of the section refers to "Private Roads," and our Art. VIII., Sec. 14, is a transcript of it. In neither State has that anything to do with railroad legislation, nor is it in any way connected or construed as connected with the articles of the constitutions on the subjects here discussed.

The Railroad Act cited by the counsel is framed under that provision, and it will be seen at once that, unlike the clause in the Michigan Constitution in question, (1) it does not require, before the taking, that the compensation "shall be first determined "by a jury of freeholders, and actually paid or secured." (2) It vests the discretion in the legislature to provide the manner and method of the condemnation proceedings, whether by jury, or commissioners, as it sees fit; and

(3) It does not provide that the question of necessity shall be passed upon by the same jury, as in our statute, but that question is reserved to the judicial function of the courts.

(Matter of N. Y. C. R. R., 66 N. Y., 409.)

The railroad law enacted under it, in fact, confers the function upon commissioners, and provides for no jury. Of course, without the Constitutional prohibition, such as we have, the legislature could pass an act putting a petitioner in possession at once pending the question of compensation, or pending appeal. We import that statute so anomalous under our Constitution, and it is the statute in question.

The New York Railroad Act cited by the counsel, and used in making up the Michigan statute, was passed in 1850.

Now, upon these particular questions, that in this case the court, by granting the new trial, and by all the proceedings of the new trial, deprived us of our Constitutional protection, and also discriminated thereby in not giving us its own uniform construction of the said Constitution, the State Supreme Court treated them as it treated all similar federal questions, hereinafter to be referred to, by simply ignoring them in the opinion on

the judgment of affirmance in certiorari, from which we come here.

Yet the questions were clearly presented in various forms as a federal question. See motion record, p. 34 (3); also in the record (not printed here, where the fact of the possession, and of the unconditional payment, appeared in the proofs, orally); again, after judgment below, see p. 53, and very fully set up in the petition to the Supreme Court for the writ of certiorari, p. 82 middle, p. 84, p. 85 bottom, p. 86, and in the assignment of errors (which was the proper practice, as hereinafter shown), pp. 92-94 (IV. and V.). The latter is the clearest and most compact summing up of all the preceding objections on this point.

(TWO).

THE DISCRIMINATION AGAINST THE PLAINTIFFS IN ERROR UNDER THE CONSTITUTION OF THE STATE, AND UNDER THE UNIFORM CONSTRUCTION OF THAT CONSTITUTION BY THE COURTS OF THE STATE, IN DEPRIVING THE PLAINTIFFS IN ERROR OF AN INDEPENDENT AND ORIGINAL TRIBUNAL OF TWELVE JURORS, BY PERMITTING TO BE FORCED INTO IT A JUDGE WITH PRECISELY, AND IN TERMS, ALL THE POWERS AND CONSTRAINING INFLUENCE OF A COMMON LAW COURT.

Under the peculiar provisions of our Constitution, as construed over and over again by the Supreme Court of Michigan, condemnation proceedings are *not* judicial proceedings, and these propositions are established:

That a judge is no part of the tribunal of condemnation, and can be no part of it.

That if a statute in terms should require him to sit, the statute would be unconstitutional.

That the proceeding is in no respect to be compared with a common law trial, and that if any judge, or court, assumes to, and does sit, as at common law trials, with the jury, the proceedings are void.

The reason of our Constitutional provision in this respect was to remedy the mischief of the old system, when power in such cases rested in permanent bodies, legislative or *judicial*, and the reasons for the change are set out in the case of Paul vs. The City of Detroit, 32 Mich., at page 113, *et seq.*

It is the settled law of this State that it was the intent of the framers of the Constitution to repose the exclusive power of passing on the questions of necessity and compensation in a *temporary* body, organized in each case in the neighborhood or vicinage of men having real property of their own, having an absolute control, by the powers conferred upon them, of the inquiry, and free from any possible influence outside their body on the part of a judge, or any one else.

All criticisms of the statute providing for condemnation in this case, as incongruous and unfitting, apply here, and have been applied in the cases in Michigan, referring to that part of the statute providing for the attendance of a judge or a Circuit Court commissioner, and in so far as that statute could be construed to authorize any such judge to *decide* questions for the jury, or to influence them, the statute would be held unconstitutional.

We will take the case cited on the other side (a decision by Justice Campbell), and quote from it as an early case, where

that provision of the statute was treated with more consideration than in any of the very large number of subsequent cases on the same point.

Toledo Railroad vs. Dunlap, 47 Mich., 462.

"The statute is evidently framed in accordance with the laws "of some other States, where the judicial power is not parcelled "out as it is here; and some complications have been caused by "this practice which introduce difficulties. We had occasion, in "the case of Michigan Air Line Railway vs. Barnes, 44 Mich., "222, to point out some of these difficulties. It is greatly to be "regretted that this species of legislation has been so very care-"lessly framed.

"In the present case some steps appear which could only "have been taken by a court in the regular exercise of judicial "power, while others belong to a different class of functions "entirely, and are governed by different considerations.

"Under our Constitution such powers as are strictly judicial "in their character can only be vested in certain courts, which "are named in the Constitution itself. The Circuit Courts—"as courts—have such powers. The judges, as judges, out of "court, do not possess them, and cannot be vested with them.

"The proceedings to condemn lands, although made under "the railroad laws, subject to judicial review and supervision "for certain purposes, are not in themselves, and never have been, "regarded as judicial proceedings. Our Constitution allows "them to be conducted by highway commissioners, in some "cases, and by specially appointed commissioners or juries of "freeholders. The inquiry in this State, as elsewhere, is an "appraisal, or estimate, of values, and not a contest on litigious "rights, and includes what is not elsewhere included, an inquiry "into the necessity of the proposed taking for public purposes, "which was never made by courts, but always, heretofore, by "the legislature or some unjudicial body of its creation. Had "it not been for the specific provisions in our Constitution the

"State could have provided for these inquiries to be made by "any medium it might select. (People ex rel. Green vs. Mich. "Southern R. R. Co., 3 Mich., 496.) Our present system is "better calculated than the old one, if fairly applied, to secure "the rights of land-owners. But the nature of the proceeding "remains as before, *a special proceeding by a temporary tribu-* "*nal, selected for the occasion, and not a judicial proceeding in* "*the ordinary sense.*

"*As provided for under the railroad laws, there are certain* "*proceedings in court to select a jury, and subsequent proceed-* "*ings to determine whether the action of the jury should be sus-* "*tained. Beyond this the courts have no part in the matter.*"

Whatever of the statute providing for the attendance of a judge is saved by construction, is to this extent only, that the jury may call for advice if they desire it, and only if they desire it. As stated in the case just cited, the jury will undoubtedly "be regarded as accepting and doing what they *permit* to be done."

We have stated the uniform construction as held in this State in an unbroken line of judgments.

Mich Air Line R. R. vs. Barnes, 44 Mich., 222.
Toledo R. R. vs. Dunlap, 47 Mich., 457.
M. C. R. R. vs. Probate Judge, 48 Mich., 638.
Railroad vs. Cheseboro, 74 Mich., 467.
Pt. Huron R. R. vs. Voorheis, 50 Mich., 510.
Railroad vs. Railroad, 64 Mich., 363.
Union Depot vs. Jones, 83 Mich., 415.
Campau vs. Railroad, 83 Mich., 31-33.
G. R. & I. R. vs. Welden, 70 Mich., 390.
Barnes vs. Mich. Air Line R. R., 65 Mich., 251.
D. L. & N. R. R. vs. Probate Judge, 63 Mich., 676.
Paul vs. City of Detroit, 32 Mich., 109.
Crane Case, 50 Mich., 182-187.
Marquette R. R. vs. Probate Judge, 53 Mich., 217.
Pt. Huron, etc. Ry. vs. Callanan, 61 Mich., 12.

The absurdity of any other rule, and of any other possible construction of the statute within the Constitution, is pointed out by Mr. Justice Grant (who delivered the opinion in this case) in Depot Co. vs. Jones et al., 83 Mich., pp. 415-418, where he says:

"These proceedings may be instituted in Probate Courts, the "judges of which are frequently not lawyers, and are unfamiliar "with the rules of evidence."

And so the practice has been to take the proceedings in Probate Courts as well as in common law courts.

Now, there were two federal questions raised under this proposition:

First: That by the decision of the Supreme Court, permitting the Circuit judge to grant new trials, the latter was put in a position to nullify the provision of the Constitution of the State, by repeatedly setting aside verdicts, until one should be reached which would suit him rather than the jury, and

That this was a judgment discriminating against the plaintiffs in error in the construction of this provision of the Constitution of the State, is clearly pointed out in the dissenting opinion of the chief justice in Union Depot vs. Backus, 92 Mich., at p. 59.

The court, in that case, did not reverse the uniform construction of the provision of the Constitution in the courts of the State by the majority opinion, although that was the wish of one of the justices, as appears by his opinion at p. 57 of the same report. The majority of the court merely sought to get round it by referring to cases which touched upon a possible *advisory* function of a judge, as above stated.

This specific federal question was necessarily made at the opening of the proceedings of the third trial, from the proceed-

ings in which the certiorari was taken to the Supreme Court of the State, in the case which comes here.

But *second:* The gravest question under this head appears by parts of the record in the trial court, which are not here, although the errors and federal question are specifically pointed out in the application for the writ of certiorari, and in the assignment of errors.

It will appear by the record not printed, not that the trial judge was "permitted" or desired by the jury, but that he *forced* himself upon the jury, with all the influence, power and devices of a court hostile to the plaintiffs in error, to control the views of a common law jury.

For instance, he told the jury, after it was impaneled, and I quote from the printed record in the State court, p. 213:

"The Court: *I shall regard this jury as a common law jury* "*and shall control them as a court, and they will have to sub-*"*mit to all the orders of the Court.*

Again to the jury:

"The Court—I will hold this jury to the same strict lines "that I would hold any jury."

Again:

"Mr. Dickinson—Let me get my record straight. I under-"stand that your honor purposes to sit here as in a trial at "common law?

"The Court—Yes.

"Mr. Dickinson—And to rule upon testimony, and to advise "and instruct the jury?

"The Court—Yes.

"Mr. Dickinson—To that I object, and not only ask an ex- "ception, but protest against it as a disregard of the Constitu- "tion of the State, and a disregard of the Supreme Court of the "State, the theory being that the jury are to get at the rights "of the question at issue as an independent tribunal, a tribunal "*sui generis*, the best way they can, without the limitations and "restrictions of a common law trial.

"Objection overruled."

Again:

"The Court—The jury will only determine those questions that "I will submit to them, *and I will see that my ruling is carried* "*out by the jury also, Mr. Dickinson.*"

And so on through the record.

By this method and this influence, by the tone and appearance of the Court, he was not merely made an advisory person (who, according to Justice Campbell in the cases cited, could not be clothed with the functions of a court), but he was made a *thirteenth member* of the constitutional tribunal of twelve persons, with more actual power in controling or influencing the jury in its deliberations, as every practitioner and judge knows, than was possessed by the whole twelve, and this without regard to his mere formal instructions and charge, which go up on appeal.

This is not the tribunal given us by the fundamental bill of rights, any more than a jury consisting of two or ten would have

been; and so, as we have seen, has been and is the construction of the Supreme Court of the State, except in the single case of these plaintiffs in error.

This federal question was carefully raised, and pointed out specifically to the Supreme Court of the State.

It was not only the mere fact that he "advised" the jury, of which we complain, but withholding from them the constitutional truth, that they were independent and that his action and advice and participation was only what they "permitted," and after all, that they alone and not himself with them, were responsible for their finding; he enforced upon them that his and their position was precisely like that of court and jury in a common law trial, with himself carrying the compulsion of respect, regard and influence of a court under which they had been accustomed to sit as jurors in ordinary trials at nisi prius.

These, and similar questions raised in the midst of the trial in the court below, have nothing to do with the carefully prepared charge of the judge below, cited with so much approval in the opinion of the Supreme Court of Michigan in this case. That charge was written, well knowing that the record of the long hearing before him, just closing, had been made by the plaintiffs in error with the one end in view, to wit: to get out of the State jurisdiction, and to reach this court on the federal questions, including as the most prominent to *him*—this one.

The mischief, and the violation of the constitution of the United States in this respect, had occurred, and had been pointed out, and the purpose to come here stated, before that charge was made.

It may be said in passing, too, that the opinion of the Supreme Court of the State in the case here, was written with the record

before it, showing that from the beginning to the end of the third trial, we had appeared under protest, and only for the purpose of making a record, to here invoke the protection of the constitution of the United States, by properly raising the federal questions.

We could not come here from the decision in 92 Mich., *supra*, because that was a *reversal*, which is not a final judgment.

Baker vs. White, 92 U. S., 176.
Houston vs. Moore, 3 Wheaton, 433.
Macomb vs. Knox County, 91 U. S., 1.
Mayberry vs. Thompson, 5 How., 121.
Rankin vs. State, 11 Wall., 380.

We do not need to appeal to the doctrine of *stare decisis* on this point. While the Supreme Court of the State does not refer to the error assigned as a federal question, raising the question of discrimination, yet in saying that a judge may preside, that court does not assume to reverse the long line of its own judgments, or to state any new doctrine, *but assumes that its decision is in line with them, and cites the cases relating to the advisory function of the judge that we have above referred to in support of its present judgment.*

Whatever may be the rule as to following the domestic court of last resort upon the construction of domestic legislation, there is certainly no rule which requires this jurisdiction to follow the court of last resort in its construction of the English language in arriving at what its courts *do* hold on the construction of its domestic constitution and legislation.

(THREE.)

DISCRIMINATION AS TO THE RULE OF COMPENSATION.

The question was raised as a federal one below, as shown in the petition for certiorari, and in the objections to the judgment. See motion record, p. 85, top, and objections and assignment of errors. As seen by the record of the State Court, now here, but not printed, as well as by his statement quoted with approval in the 92 Mich., at page 55, from beginning to end, in this and the only case in which such a construction of compensation is held to this day, the jury were confined by the trial judge on the question of compensation, to the injury to the realty only, although the business was peculiarly susceptible to destruction by the proximity of the railroads; also that the separation, that is, of the factory from the necessary connections of yard and dry house, was an injury for which compensation should be made.

Now on the third trial, for the sole purpose of making the federal question, in discrimination, we put in the proof that the profitable business in fine woods carried on by the plaintiffs in error was utterly destroyed, and that they had stopped that part of their business since the railroads were operated. We also showed the damage from the division of the plant.

The courts of Michigan have uniformly held, as stated by Mr. Justice Campbell in Railroad vs. Cheseboro, 74 Mich., p. 474, that under the Constitution,

"The damages in such cases must be such as to fully make good "all that results, directly or indirectly to the injury of the owners "in the whole premises and interests affected, and not merely the "strip taken."

The principle is repeatedly affirmed, as in the case just cited; as for instance, where there was a highway crossing over a railroad company's tracks, where the adjacent warehouse and the lands on which it stood "were rendered less available and less valuable for warehouse purposes," compensation under the Constitution was allowed.

Commissioners vs. R. R., 91 Mich., 291.

There is no question about the doctrine as uniformly held, except in this case, and applied by the Supreme Court of this State.

Commissioners vs. Railroad Co., 91 Mich., 291.
Commissioners vs. Moesta, Id., p. 149.
Grand Rapids vs. Hiesel, 47 Mich., 394.
Pearsall vs. Supervisors, 74 Mich., 558.
Detroit vs. Brennan, 93 Mich., 338.

The Supreme Court of the State in its opinion avoids this specific point, but states generally that we made no requests to charge. Of course we did not. We did not recognize the right of the judge from beginning to end to preside as a court as in nisi prius at common law. We protested against it, and never waived the point. But the record does disclose that the point was clearly made, and the attention of the court below called to it by

a statement made to the court, after an inquiry as to whether he proposed to charge the jury, that the court had been in error throughout as to what was "compensation" under the constitution. The statement was further made that if he proposed to instruct the jury, we desired to call his attention to the uniform rulings (in construction of the Constitution), of the Supreme Court of the State on the question of compensation, and we then read to him the case of Railroad vs. Weiden, 70 Mich., p. 393, above quoted, and other cases.

The language quoted from the 70 Mich., p. 393, then, as the record shows read to the court was:

"The appellants were using their property in lucrative business, "in which the locality and its surroundings had some bearing on "its value. Apart from the money value of the property itself, "they were entitled to be compensated so as to lose nothing by the "interruption of their business and its damage by the change. A "business stand is of some value to the owner of the business, "whether he owns the fee of the land or not, and a diminution of "business facilities may lead to serious results. There may be "cases where the loss of a particular location may destroy business "altogether, for want of access to any other that is suitable for it. "Whatever damage is suffered must be compensated. Appellants "are not legally bound to suffer for petitioner's benefit. Petitioner "can only be authorized to oust them from their possessions by "making up to them the whole of their losses."

The court promptly expressed its doubt of the doctrine in the presence of the jury, and never referred to it again in the charge prepared, and immediately delivered to the jury the felicitous charge as printed in the opinion of the Supreme Court.

In that connection, too, the record discloses that the counsel for the defendant in error was permitted to state to the jury with-

out challenge or reproof, and against our objection and protest, that the Supreme Court of the State had held that the verdict given in the first trial was "grossly excessive"—the amount of that verdict was before the jury.

Thus it will be seen that we were deprived of the Constitutional rule of compensation, as the term compensation has been uniformly construed by the courts of the State, by the action of the lower court, brought clearly and regularly before the Supreme Court of the State, on the certiorari in an appeal to that court for protection under the Fourteenth Amendment of the Constitution of the United States.

The State Supreme Court in its opinion ignored this federal question, and did not touch upon it in any way, although it was most fully argued in the brief and orally.

(FOUR.)

DISCRIMINATION IN DENYING US THE PROTECTION OF THE CONSTITUTIONAL PROVISION AS THE COURTS OF THE STATE UNIFORMLY CONSTRUED IT, EXCEPT IN THIS SINGLE CASE, CONFERRING UPON US THE RIGHT TO HAVE BOTH THE QUESTION OF COMPENSATION AND NECESSITY PASSED UPON BY ONE AND THE SAME JURY.

(Supreme Court assignment of error, VI., p. 95, motion record).

The Constitution of the State provides (Article XVIII., Section 2):

"When private property is taken for the use or benefit of the "public, the necessity for using such property, AND the just com- "pensation to be made therefor, except when to be made by the "State, shall be ascertained by A jury of twelve freeholders resid- "ing in the vicinity of such property, or by not less than three "commissioners appointed by a court of record, as shall be pre- "scribed by law."

This Constitutional guaranty applies to "cities and villages" as well, and in respect to the point here taken, is to be construed as

importing that guaranty into Article XV., Section 15 of the same Constitution, heretofore quoted, as follows:

"Private property shall not be taken for public improvements "in cities and villages without the consent of the owner, unless "the compensation therefor shall be first determined by a jury of "freeholders, and actually paid or secured in the manner provided "by law."

The right to have the same jury determine the question of necessity as well as the amount of compensation is decided in

Paul vs. Detroit, 32 Mich., 108.
Horton vs. Grand Haven, 24 Mich., 465.
Arnold vs. Decatur, 29 Mich., 77.

And these cases also directly on the point that Article XV., Section 15, must "in this respect" be taken together with Article XVIII., Section 2.

There is no question as to this construction of the Constitution by the courts of the State, and the reasoning is given most clearly by Mr. Justice Campbell in delivering the opinion of the court in Paul vs. Detroit, 32 Mich., p. 109, and cases cited at p. 114 *et seq.*

In that case, after referring to the ambiguities and incongruous provisions of the statutes framed under these Constitutional provisions, and stating that the statutes are patterned after laws belonging to a different system, and after reviewing the law as it

existed before the adoption of our present Constitution, the Court says :

"The Constitution has changed this by requiring the whole "subject to be determined by a jury of freeholders. * * * * * * "This question of necessity is the one on which the right "to take private property *entirely depends*, and on which parties "have a full right to be heard. *But this is not all. A jury can "render only one verdict, and that can only be given when the "whole inquiry before them is ended. In cases like this, they "cannot determine the necessity by itself.*"

It will be seen how radically different this fundamental system and this bill of rights are in this regard from the New York Constitution, under which its statute is framed, and under which authorities are cited in the decisions of the Supreme Court of Michigan, and the briefs of counsel, in this litigation.

Our position was, as shown by the record below, that it was essential for the protection of the citizen that both questions should be heard together; and that it is the absolute and constitutional right of the citizen to have the finding on one branch of the subject influenced by the evidence and conclusion upon the other branch. Furthermore, that even if the statute could be construed as providing a separate trial, the statute would be held unconstitutional, as seen by the construction of that Constitution in the uniform decisions of the courts of Michigan.

But we were discriminated against even in applying the statute, unconstitutional and faulty as it is, in so far as it could possibly

be construed as permitting the separate trial of the two questions of necessity and compensation. Its provision in this regard as quoted in the brief of the counsel for the defendant in error (p. 8), states:

"Nor shall it (the appeal) affect any part of said report in any "case except the part appealed from."

Now in this case, as shown by the original record certified to this court on this writ of error, the *defendant in error appealed from the verdict of the jury on both questions*—the question of necessity as well as the question of compensation—and yet the court, in defiance of the constitutional provision that both questions should be tried together, as that constitutional provision has been invariably construed by the courts of the State, and in defiance of the statute as well, directed, and the lower court proceeded to try, the question of compensation separately from that of necessity.

Of course that was a question going to the validity of the whole proceeding under the Constitution, and could not be raised as a preliminary objection on the third trial, nor until it was found that the court below would, in spite of our invocation of the protection of the Constitution of the State, and of the Constitution of the United States, refuse to submit to the jury the question of necessity.

The record discloses that we then made the point clearly on the theory that when the discrimination was shown, the federal Con-

stitution should be applied by the court below, notwithstanding the direction of the Supreme Court of the State upon that question.

The point was then made on the record, and was assigned in the Supreme Court as error, upon the federal question, as will be seen by assignment of error VI., p. 95, of the motion record.

This federal question, distinctly made, and argued fully in the briefs and orally, is also ignored in the opinion of the Supreme Court.

II.

DUE PROCESS OF LAW.

Of course the act of the court is the act of the State, as we have seen under the authorities hereinbefore cited.

"Due process of law within the meaning of the Constitution is "secured where the laws operate on all alike, and no one is sub-"ject to partial or arbitrary exercise of the powers of government."

Caldwell vs. Texas, 137 U. S., 692.

As stated by this court in the learned opinion delivered in Marchant vs. Pennsylvania Railroad, 153 U. S., pp. 380-386:

" It is not necessary to enter into an examination of the origin, " meaning and scope of the phrase 'due process of law,' as found " in the Fifth and Fourteenth Amendments. That has been done " so often and so thoroughly in previous cases that all we need " do is to cite a few of them."

In Hager vs. Reclamation District, 111 U. S., pp. 701, 708, it is said:

" It is sufficient to observe here, that by ' due process ' is meant " one which, following the forms of law, is appropriate to the " case, and just to the parties to be affected. It must be pursued " in the ordinary mode prescribed by law. It must be adapted " to the end to be attained; and *wherever it is necessary for the* " *protection of the parties, it must give them an opportunity to* " *be heard respecting the justice of the judgment sought.*

" The clause in question, therefore, means that there can be no " proceeding against life, liberty, or property, which may result " in the deprivation of either, *without the observance of those gen* " *eral rules established in our system of jurisprudence for the* " *security of private rights.*"

In Missouri Pacific Ry vs. Humes, 115 U. S., 520:

" If the laws enacted by a State be within the legitimate sphere " of legislative power, and their enforcement be attended with the " *observance of those general rules which our system of jurispru-* " *dence prescribes for the security of private rights*, the harshness, " injustice and oppressive character of such laws will not invali-

"date them as affecting life, liberty or property without due pro-
"cess of law."

In Davidson vs. New Orleans, 96 U. S., p. 97:

"It is not possible to hold that a party has, without due process
"of law, been deprived of his property, when, *as regards the issues*
"*affecting it, he has, by the laws of the State, a fair trial in a*
"*court of justice, according to the modes of proceeding in such*
"*a case.*"

Within the rule thus repeatedly laid down, we submit, under the points heretofore made, without anything farther, that we are entitled to invoke the jurisdiction of this Court, and go into the merits on the ground that the procedings were not due process of law, because the laws have not been made to "operate on all alike," and that plaintiffs in error have been subjected to a "partial and arbitrary exercise of the powers of government."

But farther, under the rule quoted from the cases, we submit that among the rights protected, one of the "GENERAL RULES "WHICH OUR SYSTEM OF JURISPRUDENCE PRESCRIBES FOR THE "SECURITY OF PRIVATE RIGHTS," ONE OF THE MOST SACRED AND CAREFULLY GUARDED IS THE RIGHT TO HAVE AN OPPORTUNITY TO BE HEARD IN A COURT OF JUSTICE.

(ONE.)

HEARING DENIED.

We set up in the application for certiorari as a federal question, and in the assignment of errors *in the Supreme Court of the State (see p. 102, motion record, XXXIII.):

(First) That the third trial was had under the decision in the 92d Mich., p. 33, reversing the Supreme Court's own judgment in the 89th Mich., p. 209, without having ordered or suggested a reargument, and without hearing from plaintiffs in error any re-argument thereon.

(Second) That the trial was had under the decision in the 92d Mich., p. 33, and that in the *latter case* the court had reversed the judgment below against these plaintiffs in error upon the most important point in the case on the merits, (to wit: Whether it was error below for counsel for plaintiffs in error to argue that the property of the Michigan Central Railroad Company might be taken under condemnation proceedings when the evidence might show that the property was not in use by the said Michigan Central Company), after notifying counsel not to argue that question because the court was with the plaintiffs in error, against a reversal on that ground.

*In printing the motion record, there is an error in importing the first three lines of this assignment from some other place.

Section 3357 of Chap. 91, of the Michigan Statutes, provides:

"When any part of the land of any railroad company in this "state, in or adjacent to its depot grounds is not in actual use for "depot or other purpose pertaining to the operation of a railroad, "and such land is not needed by said railroad company for the "purpose of a depot or other terminal facilities, it shall be lawful "for any other railroad company, organized as aforesaid, needing "such land for the purpose of a depot or other terminal facilities," etc., to proceed to condemn it as in other cases.

As this question bore on the question of necessity, the Chief Justice of the State Court at the argument at once stopped the counsel for plaintiffs in error upon that branch of the case, and stated that the court did not desire to hear argument on that question, because the verdict of the jury had been unfavorable to the plaintiffs in error, and this was not their appeal. Nevertheless, the court, without having offered to hear counsel for plaintiffs in error further, decided that very question adversely to the plaintiffs in error, and reversed on that very point.

On these two positions we raised the federal question that we were not accorded a hearing on controlling questions, but were deprived of it.

Now, under the decisions of the State Supreme Court itself, due process of law, as above defined by the decisions of this court, required a re-argument before the reversal of the judgment in the 89th Mich., 209.

We may say in passing that there had been a change in the composition of the court in this case. The Chief Justice who delivered the opinion in 89 Mich. having retired before the case in 92 Mich. came up.

The universal doctrine is that there can be no change in a decision of a court in a case between the same parties unless the court itself desires a re-argument and orders it.

See discussion of the question by Mr. Justice Cooley in Jacobson vs. Gunsburg, 42 Mich., pp. 90-93 bottom, *et seq.*

See same judge in McCutcheon vs. Common Council, 43 Mich., p. 483.

Hickox vs. Railroad, 94 Mich., p. 237, quoting Chief Justice Cooley, in Motz vs. Detroit, 18 Mich., p. 522, as follows:

"A due respect to our predecessors, I think, and to uniformity "and stability in judicial action demands that we recognize this "point as no longer open to controversy." * * * "The im- "portance of adhering to judicial decisions except when unmis- "takably wrong and mischievous, can certainly require no illus- "trations at our hands"—and see other cases cited.

In Damon vs. De Bar, 94 Mich., 594, the court quoted the Michigan authorities, and stated that it was the settled rule of law that the rule laid down by a court in the decision of a cause is to be applied in all subsequent proceedings in the cause, unless a re-hearing is called for and had. See cases quoted.

This was a plain case, not of *stare decisis*, but of *res adjudicata*, binding on the parties and their privies.

The doctrine applies to intermediate mandamus proceedings.

In Weed vs. Mirrick, 62 Mich., 414, where, in the course of the proceedings, certain questions had come up and been decided by the Supreme Court upon mandamus against the judge, as in

this case, pending the main litigation, that court held when it came to a final judgment in the cause, that the rulings of the court in the mandamus proceedings on questions there passed upon were *res adjudicata* at the final hearing of the cause.

Now, the fact that there was *no rehearing ordered or had* before the delivery of the judgment of reversal of the 89th Mich., in 92 Mich., appears:

(First) By the full and complete return on this very point in the record now here, but not printed on the motion.

(And second) By the statements in the application for certiorari to the Supreme Court of the State, standing uncontradicted by the return. (And if uncontradicted, its allegations must be taken as true. See Wilson vs. Board, 87 Mich., p. 248, Sec 4, top).

On the other point regarding the right to condemn unused Michigan Central property, we insist that it is the universal law, binding on all courts without exception, that counsel and parties cannot be refused a hearing on an essential point by a court, on the ground that the court is satisfied in their favor on the point, and then be defeated and condemned by that court upon the very question in which a hearing is so denied.

To do this is a violation of a fundamental right now guaranteed to every citizen under civilized governments everywhere.

We raised both questions as federal questions, regularly and specifically, and these are ignored in the opinion of the Supreme Court of the State.

The right to a hearing is announced over the door of the Place of Justice as a first assurance to every citizen, and he is advised of it as an elementary right which the Constitutions protect him in as the first and absolute requisite of "Due process of law."

The Judgments and Execution were not due process of law.

Aside from all other questions arising on the conditions of this record as to the constitutionality of any statute (as the provisions of our Constitution are construed by the State court itself) which should authorize a judgment against a citizen whose property is sought under the power of eminent domain, *the statute itself puts no jurisdiction anywhere to enter a judgment against him unless he himself has appealed from the award of compensation and goes into a new trial in which the award is reduced.*

The language of the statute is, "If the amount is diminished the difference shall be refunded to the company by the party to whom the same may have been paid, and judgments therefor, and for costs of the appeal shall be rendered "AGAINST THE PARTY SO APPEALING."

The next line expressly refers to the case where a citizen appeals.

Now, the plaintiffs in error were NOT "THE PARTY APPEALING" in this case.

The defendant in error *was* the "party appealing."

We shall insist on the argument that this language of the statute is no clerical error, but is the law under the decisions of the State Supreme Court construing our Constitutional provisions.

The citizen brought into court by compulsion, owing no duty which he has violated, knows that under the Constitution of his State, as construed by her courts, no verdict for his compensation can be disturbed (except in case of acts *going to the jurisdiction* of the special tribunal for condemnation), unless he himself *waives* the verdict by appealing.

No verdict for the citizen, in such cases, was ever before vacated in Michigan on an appeal by *the condemning corporation* except for causes going to the jurisdiction. Never for excessive damages or alleged irregularities.

See all the Michigan cases supra, of which 83 Mich., 415; Union Depot vs. Jones, and Crane's Case, 50 Mich., 182-187, are fairly representative.

The reasoning of the court below on the question of costs (61 N. W. R., 791 top) under this statute, is, we submit with due respect to the State court, logically absurd. There is no provision for costs against the citizen "appealing," unless the award is finally "diminished." None, by the letter or by our State's construction of the statute, in case the award is "increased."

But of this on the oral argument.

The Execution.

The action of the court in issuing the writ, and the seizure under it of $110,000.00 in value of personal property was before the court, as shown by the motion record, on our allegation that it was not due process of law.

The statute providing for judgment, did not provide in what court it should be entered, and *did not provide for execution at all*. Judgments do not imply executions (Freeman on Judgments, p. 4; Kramer vs. Redman, 9 Iowa, 114).

In Michigan, as elsewhere, it is the law, that when proceedings are statutory, within the statute, which must be strictly pursued, must be found authority for every act, remedy and process. If the statute fails to provide any proceeding essential to execute its purposes, the statute must fail for want of that essential. Nothing can be imported into it, to help it out, from other statutory and common law remedies. The remedies provided are exclusive.

The case of *Derby v. Gage, 60 M., 1.* The statement of the case and in the decision, is a restatement of this principle, and not, as the court below deems necessary to explain, an authority merely that an execution could not issue against a petitioning corporation in the case stated.

To get an execution in this case it was necessary to go for alleged jurisdiction to the statute of practice applying to common law nisi prius courts and the Supreme Court. (Howell Comp., § 3468.)

This the Supreme Court does without further reference to the subject.

Yet the Probate Courts are under the law used for condemnation proceedings.

If the Supreme Court is right here, then the Probate Courts may issue execution under the same statute, although that court holds uniformly that the Probate Court has no powers of a common law nature. (Holbrook vs. Cook, 5 Mich., at p. 228.)

And in D., L. & N. R R. vs. Probate Judge, 63 Mich., 676, Justice Campbell passes on the powers of Probate Courts in this class of proceedings for condemnation, and holds that they have no common law powers, and that such powers cannot be conferred by statute in aid of the jurisdiction.

PRACTICE IN THE STATE SUPREME COURT ON CERTIORARI.

The Supreme Court of the State gets its jurisdiction to issue the writ of certiorari from the Constitution of the State, and not by statute.

Specht vs. Detroit, 20 Mich., 168.
Lantis Case, 9 Mich., 324.
Farrell vs. Taylor, 12 Mich., 113.

The practice on certiorari is, therefore the common law practice.

The 16th rule of the Supreme Court of the State requires an assignment of errors in accordance with that practice. That rule is as follows:

"Rule 16—If the plaintiff in error fails to have the writ of "error, *or certiorari* returned on or before the return day thereof, "or to *assign errors*, and serve copies of such assignment within "the time allowed for that purpose, the defendant in error may "move the court to have the writ of error, or *certiorari* dismissed "for want of prosecution."

Stokes vs. Davis, 10 Mich., p. 290, cited by counsel for defendant in error, is not an authority. It is a *per curiam* statement consisting of a line without any statement of the case, and simply to the effect that an amendment was not required.

An assignment of errors is necessary, and doubtless may be inserted in the application for certiorari, as was done in the case cited by the counsel from 69th Mich., pp. 572-576—Grand Rapids vs. Weiden. For aught that appears an assignment of errors was in the application for the writ in the case of Stokes vs. Davis, *supra.*

The case of Witherspoon vs. Clegg, 42 Mich., 485, and cited by counsel, and other similar cases on certiorari from *justices' courts*, are not in point at all, for the simple reason that certiorari

proceedings to justices' courts are *purely statutory*, and the *statue requires* that the errors shall appear on the face of the affidavit for certiorari. How. Stat., Section 7032, et seq.

"Statutory certiorari is special, and the proceedings to obtain "a review thereby must be strictly complied with."

Sherwood vs. Allegan Circuit Judge, 80 Mich., 270.

All that is meant in the 65 Mich., 572-576, *supra*. as to the practice in the Supreme Court is this: That the application for certiorari must present a record showing the errors complained of, afterwards to be assigned, "as in a bill of exceptions."

Knapp vs. Gamsby, 47 Mich., 375.

Of course, an assignment of errors set out in the application for certiorari would be considered, but inasmuch as the application for certiorari must be sworn to, it is not the proper practice to make the petitioner for it swear to a lot of assignments of error in law. The proper practice is, under the jurisdiction of the *Supreme Court* in certiorari, to assign errors precisely as was done in this case, and as is required by the rule.

THE ERRORS OF LAW IN THE OPPOSING BRIEF ARE

(1) In ignoring the federal questions presented and argued below, as we have seen, on the evident ground that the Supreme Court of the State avoided passing upon them in its learned opinion.

(2) In his statement of the practice in certiorari.

(3) In assuming that to raise the federal questions, we must show discriminating *legislative* action, or that we allege that the statute is a violation of the Fourteenth Amendment, rather than that the same principle applies to *judicial* acts, and that we allege discriminating judicial action in giving one construction of the Constitution of the State to others, and another to plaintiffs in error.

(4) In assuming that we contend, or that it is necessary that we contend, that the Supreme Court of the State has no power to overrule or reverse prior decisions; whereas we allege that it has not reversed or overruled prior decisions at all, nor assumed to do so, but has adhered to the former decisions on the construction of the Constitution, and still adheres to them, but denies to us the benefit of that construction.

(5) In assuming that we attack the application or construction of the *statute*, rather than the failure to apply and construe as usual the provisions of the fundamental law—the *Constitution* of the State.

(6) In the misapprehension and misapplication of the statute and authorities in New York, under a radically different Constitution, to cases arising under the Michigan Constitution.

THE STATE COURT OPINION IN THE JUDGMENT APPEALED FROM.

This was a case in certiorari.

(Depot Co. vs. Backus, 61 N. W. R., p. 788.)

Postponing until the hearing on the merits some further discussion of that decision, and of the exceptionally well prepared

charge of the trial judge below, quoted in that opinion, we desire in this place to make one other comment upon the latter. We quote:

"The case was afterwards brought to this court by appeal, "and is reported in 92 Mich., 33, and 52 N. W. R., 790. After "that decision, the case was again tried before a jury, resulting "in a verdict for Absalom Backus, Jr., for $15,000, and for "Backus, Jr., & Sons for $48,000. For a full statement of the "case reference is had to the former decisions. The case is "now brought before us on a writ of certiorari, and *substantially "the same questions are involved and argued as are stated in "the opinion in the 92 Mich. and 52 N. W. R.* No motion "was made for a re-hearing of that decision. The case was "remanded for new trial under the rulings then made. The "respondents will not now be heard upon the questions then "decided, and we shall not argue them. By entering upon a "new trial without a motion for a re-hearing, both parties "adopted that decision as the law of the case, and conducted "the trial under it. All the questions are, therefore, *res judicata*, "and are not now open for review!"

This on certiorari—not error or appeal. ("Certiorari is not a flexible remedy, as *it only admits of quashing the proceedings reviewed or of refusing to do so.*" Whitbeck vs. Common Council, 50 Mich., 86.—"Condemnation proceedings" on certiorari, 1 Jacobs & Ch. Mich. Dig., p. 182.)

We have seen before at page 11 of this brief that the Supreme Court of the State reviews only jurisdictional questions on certiorari. The principles applied to the review of cases at common law, or in equity, on mere questions of error in the admission or exclusion of evidence, or upon the usual issues heard in such cases, can hardly be ruled as applying to us on this record. No new trial was sought or could be sought in the case by plaintiffs in error.

We have also seen at page 30 of this brief that after the decision referred to in the 92d Mich., which was a *reversal*, we could not come here as from a final judgment, under R. S., 709. Our position was that every direction given in the 92d Mich., and all subsequent proceedings in the State court, were absolutely void, including the execution, because without jurisdiction, and in direct violation of the Constitution of the United States.

After the decision in the 92d Mich., all parties and courts fully understanding that we proposed to assert their void character under the Fourteenth Amendment, we had two courses open to us.

(First) We could have abstained from attending the third trial at all, waited until some action was taken sequestering our property, or attempting to do so, and then have sued the officer of the State court as a trespasser in the Circuit Court of the United States, under the Act of Congress of March 3, 1887, amending the Act of 1875, giving that court original jurisdiction in any suit of a civil nature at law or in equity, arising under the Constitution or laws of the United States, and so raised these questions, bringing on an undesirable conflict of jurisdiction.

(Or second) Having regard to the rule of comity, we could enter the State court, under protest against the jurisdiction, raise the same federal questions, get to the Supreme Court for a final judgment on these federal questions, and come here in a way more preferable under the circumstances, under Section 709 of the Revised Statutes, on precisely the same record which we might have made in an original suit for trespass in a federal court.

This latter course we have taken.

To say, or to suggest, that by so doing, we have waived any of the jurisdictional questions, or the federal questions, or by not making a motion for re-hearing in the 92d Mich., we have waived anything, or that we are bound by anything said in that case by the court, in any way, manner or form, is not the law.

Neither can we be obstructed on such questions as these by any possible application of the doctrine *res judicata*. The record will show that we protested the jurisdiction at every stage in regular and due form, and that we went into the proofs under protest, and then only, as stated, to establish our position under the Constitution of the United States, as discussed at pages 31-34 of this brief.

We submit that the motion must be denied.

DON M. DICKINSON,
Counsel for Plaintiffs in Error.

Supreme Court of the United States.

Filed Jan. 3, 1898.

ABSALOM BACKUS, JR., and A. BACKUS, JR. & SONS (a corporation),

Plaintiffs in Error,

vs.

THE FORT STREET UNION DEPOT COMPANY.

Error to Supreme Court of Michigan, October Term, 1897.—No. 55.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

DON M. DICKINSON,
Of Counsel for Plaintiffs in error.

DETROIT:
JOHN P. BEST, PRINTER.
1897.

Supreme Court of the United States.

ABSALOM BACKUS, JR., and A. BACKUS, JR. & SONS (a corporation), Plaintiffs in Error, vs. THE FORT STREET UNION DEPOT COMPANY.	Error to Supreme Court of Michigan, October Term, 1897.—No. 55.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

PARTIES.

Absalom Backus is a citizen of the State of Michigan and of the United States, residing in the City of Detroit;

A. Backus, Jr., & Sons is a corporation created and existing under the laws of the State of Michigan, and having its principal office and carrying on its business in the City of Detroit;

The Fort Street Union Depot Company is a corporation created and existing under the laws of the State of Michigan.

This case has been before this Court on the motion of the defendant in error to dismiss the writ of error for want of jurisdiction. On that motion, printed briefs were filed, and the questions on the motion to dismiss were reserved for the final hearing.

Since the motion to dismiss was so disposed of, all the essential questions there presented have been ruled in favor of the plaintiffs in error by this Court in its judgment delivered on March 1st, 1897, in the case of Chicago, Burlington & Quincy R. R. vs. Chicago, 166 U. S., page 226. The motion to dismiss for want of jurisdiction is discussed and passed upon in that case commencing at the bottom of page 230.

As in that case, the proceedings in the courts of Michigan, now brought here, were instituted by the defendant in error for the condemnation of property for alleged public purposes.

THE PROPERTY AND BUSINESS INVOLVED AND ITS RELATIVE SITUATION TO THE RAILROAD.

The business of A. Backus, Jr., & Sons was manufacturing the finest of woodwork, and in that it had been engaged for many years, and in that had accumulated its plant in the City of Detroit. It manufactured fine moldings in fancy woods, in oak, ash, clear pine and white woods for inside house finishings, casings, car sidings, car roofing, and general house building lumber for finishings, all for oil finish; also fine moldings for pictures, wainscotings, ceilings, moldings and floorings in houses. (R., p. 1213, folio 2063—pp. 1493-4.)

While it has been also called a box factory sometimes by the *nisi prius* Judge (Gartner) and counsel, to depreciate the character of the business, the box business was but a tenth of the business, and the boxes were made from the lower grades of lumber, strippings from it, and odds and ends. (R., pp. 1488-1493.)

The machinery was of the most delicate description, and the work required not only skilled men, but the utmost

alertness in directing the delicate tools, the best of light, and above everything in the product, cleanliness.

Sales were made all over the United States and Canada; the competition was very great; the profits exceedingly narrow, and success depended upon fine work and volume of business.

The plant was all situated in the City of Detroit, and consisted of three parts: (1) The manufacturing establishment or mill, situated on the northerly side and fronting on River street, which is the oldest of the public streets of Detroit, and is the first street inland from the Detroit River, with which it is parallel. This mill covered one and three-fourths acres of land, with a front on River street of two hundred thirty-eight and forty-hundredths feet, extending back through the block to the next steeet—Fort, which street is fifteen feet higher than the level of River street; (2) A large lumber yard, consisting of seven acres, with a dockage front on Detroit River, and a city front on the opposite side of River street, below the mill, and was the reception place for receiving and seasoning the raw lumber, and for shipments of product by water. (3) The remaining part of the plant was a short distance above the mill on Fort street, covering nearly a block, and consisted of a large brick structure for the clean storage and sale of the fine product of the mill.

The Michigan Central railroad furnished railroad accommodations for shipment *at grade*. That road passes under Fort street, and approaching River street obliquely, passes the northwesterly side of the Backus property, contiguous to it, with its main tracks eighty feet distant at the extreme end, and continually receding until it is three hundred feet from the Backus property as it passes into River street. The mill is of brick, forty-five to forty-eight feet high, and the mill was built and arranged, as

shown by the record, with reference to its relative situation to the Michigan Central Railroad, and for the protection of the property from that road, a stone wall was built the whole length of the factory between it and the Michigan Central road. (R., p. 551.)

The interest of the parties was as follows: The fee of the realty was in A. Backus, Jr., the originator of the business, and was rented by him to the corporation by a lease made in 1885 for $18,000.00—$5,000.00 for the factory site, $12,000.00 for the lumber yard property, and $1,000.00 for the warehouse. The cost and value of the plant and its volume of business will be referred to later.

The structure of the defendant in error—the Union Depot—fronts upon Third and Fort streets, and with its local freight house covers about six acres. To reach it by the Union Depot Company approach, their elevated railroad structure enters fully into full possession of River street at Twelfth—a street running at right angles with River street just below the Backus factory. It pursues River street past the Backus front toward the center of the city to Seventh street, and then curves out of the street to its new depot. Shortly before reaching Twelfth street, in its approach to the Backus factory, the structure begins an elevated grade and passes Twelfth street, with an ascent of fifty-two and eight-tenths feet per mile, and continues ascending more gradually until reaching and passing the Backus property, through its entire front, it is at an ascending grade of twenty-two feet to the mile. The elevated structure spans the entire width of River street, both in front and below and above the Backus factory, from curb to curb. In front of the Backus property there are three broad gauge tracks. There is a switch in front of the Backus property, and a switching house. Added on to the width of the railroad viaduct itself, and contiguous to it, there is an elevated viaduct

for teams, solidly made, of the width of twenty-four feet. All three tracks are laid upon ties, and the space between the ties is six inches. The cars in passing project over the elevated structure from one to two feet. The top of the rails on the structure in River street is twenty-five feet from the roadway.

The enormous business—freight and passenger—passing over the road up that grade in front of the Backus property per day, is shown by the testimony of Daniel R. Griswold and his associates, at the last hearing, who took daily observations for a period (R., pp. 1228-1229 et seq.), which is in no manner contradicted or challenged.

The grade above stated up which locomotives must labor is shown by the admission at pp. 1233-4 of Record. Freight of the heaviest description is carried over that road, and trains are made up in front and stand there. (R., p. 1235.)

The fatal effect upon the peculiar nature of the business is shown hereafter under the proper head.

THE PROPERTY TAKEN.

In Michigan, as elsewhere, the land-owner upon a street, or any public highway, as upon a stream, owns to the center of the street or stream as a part of his freehold. This is the presumption and the rule without any qualification, unless an express limitation is inserted in his grant. Cooley, J., in G. R., etc., R. R. vs. Heisel, 38 Mich., pp. 62-72; Watson vs. Peters, 26 Mich. (Ann.), p. 508, note 1 and cases; Purkiss vs. Benson, 28 Mich., pp. 537, 540, 542 (Campbell, J.); and in such cases "the gen-"eral principles on which damages will be assessed would "be the same that they would have been had no highway "previously existed, and the existence of the highway "would only be a circumstance tending to diminish the "recovery."—Cooley, J., in 38 Mich., 69.

But furthermore, his property right, in addition to that, extends to the easement on the other half of the street and up and down the street for light, air and movement.

"'The constitutional provision is adopted for the pro-
"'tection of and security to the rights of the individual
"'as against the government,' and the term 'taking'
"should not be used in an unreasonable or narrow sense.
"It should not be limited to the absolute conversion of
"property, and applied to land only; but it should in-
"clude cases where the value is destroyed by the action
"of the government, or serious injury is inflicted to the
"property itself, or exclusion of the owner from the en-
"joyment, or from any of the appurtenances thereto. In
"either of these cases it is a 'taking' within the meaning
"of the provision of the Constitution."—Pearsall vs. Supervisors, 74 Mich., 558, which was a discontinuance of a state road.

In Grand Rapids vs. Heisel, 47 Mich., 394, it was held that the use of a street by a railroad as to an adjacent owner was a "taking" such as could only be acquired by condemnation proceedings, and the authorities are there cited.

In Riedinger vs. Marquette R. R., 62 Mich., 29, the City of Marquette granted the use of a street to a railroad and the railroad company was enjoined. The Court says that "the purchaser of a lot fronting a street has a right "to have the street kept open for the usual and custom-"ary methods of travel. The grantor cannot, thereafter, "withdraw or change the use of such public spaces, to "the detriment of the grantees and the destruction of "their right in the street or public grounds on which their "lots abut."

To same effect Taylor vs. Railway, 80 Mich., 77 (Grant, J.)

So far as the other half of the street is concerned, the Supreme Court of Minnesota said, in Lamm vs. Chicago

R. R., 45 Minn. R., p. 71: "The very groundwork upon "which recovery is based is that an abutting owner has, "in the *opposite half of the street*, not a fee, but an ease- "ment for light and air for the benefit of his premises."

The leading case in New York is the Elevated R. R. case of Lahr, 104 N. Y., 268, to the effect that the property of the abutter in the street consists of his easement up and down the highway on each side, and beyond him, as well as for the entire width of the street. To the same effect see the large number of cases cited in the 36 Eng. & Am. Railroad cases, page 16 and note.

THE PROCEEDINGS.

The proceeding was commenced in the usual form by petition filed January 24, 1891, in the Circuit Court for the County of Wayne. The respondents demanded a jury. Under the Constitution of the State of Michigan, the jury and the same jury must pass on the question of necessity as well as of compensation.

The first hearing before a jury, which was, in accordance with the fundamental law and practice in Michigan, without an attending judge, was commenced on February 25, 1891, and terminated on March 18, 1891, in a disagreement of the jury on both issues—that of necessity and compensation.

A second hearing before a jury, also without an attending judge, was commenced on June 10, 1891, and resulted on July 16, 1891, in the following verdict:

> "In favor of the railroad company on the ques- "tion of public necessity, assessing the damages of "the respondents as follows:
> "To Absalom Backus, Jr., as the owner "of the fee.....$17,850.00.
> "To the corporation, A. Backus, Jr., & "Sons ..... 78,293.00."
> (Record, p. 847.)

Thereupon the petitioning railroad company made a motion, before Circuit Judge Gartner, to set the award of the jury aside, and to order a new trial before another jury, which order was granted on October 26, 1891.

Thereupon the respondents—the plaintiffs in error—applied to the Supreme Court of the State for writ of mandamus to compel the Circuit Judge to set aside the order vacating the award and for a new trial, as being unprecedented and beyond the jurisdiction of the Circuit Judge under the Constitution and Statutes of the State.

On a full hearing by a unanimous bench, the mandamus was granted on November 19, 1891—Chief Justice John W. Champlin delivering the opinion. (R., p. 931.) Backus et al. vs. George Gartner, 89 Mich., 210.

Thereupon, on November 27, 1891, without waiting for any action on the part of the respondents—these plaintiffs in error—*the railroad company* moved for a confirmation of the award before the same Circuit Judge, and served a copy of the proposed order, novel in form, set out at page 945 of this Record.

That order provided for the deposit of the amount of the award in the Detroit National Bank, to remain on deposit in said bank "subject to be drawn therefrom and "to be paid to the parties entitled to the same on orders "signed by one of the judges of this court and counter-"signed by the clerk;" and further providing that on such deposit that the railroad company should be "entitled to "enter upon and take possession," and that the respondents should be "divested and barred of all right, estate "and interest in such right of way."

Plaintiffs in error appeared and objected to the form of the order and insisted on the usual form (Rec., p. 943), but were overruled and the order as proposed entered on November 30, 1891. (R., p. 945.)

Two days thereafter, on December 2, 1891, the defendant railroad company appealed to the Supreme Court "from the verdict, award and report of the jury in this "cause and from the confirmation thereof." (Rec., p. 947.)

It is to be observed in passing that the appeal was from the award and confirmation on both questions—that of *necessity* as well as that of compensation.

On January 26, 1892, the railroad company took complete possession of the property sought to be condemned, constructed its railroad in every respect as sought in its proceedings, operated the roads to their full capacity, as hereinafter shown, and on the same date paid over directly to the respondents—plaintiffs in error—the total amount of the award. (Rec., pp. 1151-1152.)

These facts as to the possession and construction of the railroad were fully before the Supreme Court on the certiorari record, as well as the fact of payment of the award.

On March 3, 1892, the appeal was argued, and on June 10, 1892, after having heard the appeal, the Supreme Court of the State entered an order setting aside the verdict and award of the jury in so far as the same fixes and determines the compensation and damages, and *confirming* the award of the jury on the question of public necessity, and further ordered a new hearing before a new jury on the question of compensation alone (Rec., 968, fol. 1670)—the Chief Justice dissenting in a full opinion.—Union Depot Company vs. Backus, 92 Mich., p. 33—dissent, p. 59.

In its judgment, the Supreme Court of the State held that its unanimous judgment in the case of Backus vs. George Gartner, 89 Mich., 210, delivered by Chief Justice Champlin, who had since left the bench, was erroneous, and reversed it, although no rehearing between the parties in the case of Backus vs. George Gartner, 89 Mich.,

p. 210, had been ordered, directed or permitted. (Rec., p. 1831, fol. 3069 bottom.)

Thus, by the reversal of the mandamus judgment in 89 Mich., p. 210, the case went back to Judge Gartner, in effect conferring upon him power to grant one or more new trials in his discretion until a verdict should be reached to his satisfaction. There could be no other or further appeal to the Supreme Court of the State, even under the incongruous statute hereinafter set out. The Supreme Court itself if it could grant a retrial at all under that statute, was limited to but one exercise of that power.

Up to the decision in 92 Mich., p. 33, no federal question could have been raised, as that case was a *reversal*, from which we could not come here under Revised Statutes, sec. 709—Baker vs. White, 92 U. S., 176; Houston vs. Moore, 3 Wheaton, 433; Macomb vs. Knox County, 91 U. S., 1; Mayberry vs. Thompson, 5 How., 121; Rankin vs. State, 11 Wall., 380.

On the mandate of the Supreme Court of the State going down, a motion was made before Circuit Judge Gartner for an order to impanel a new jury and for a retrial. (Rec., p. 970.)

Whereupon the respondents—the plaintiffs in error—filed a sworn plea and protest in their own proper persons, challenging the jurisdiction on the following grounds:

That the order and direction of the Supreme Court and of the court below, directing a re-trial and the proposed re-trial did and would constitute a denial by the State to the plaintiffs in error of the equal protection of the laws, contrary to Article XIV. of the Constitution of the United States, specifying and pointing out the violation of the Constitution of the State, and the discrimination on the part of the State against the plaintiffs in error in hold-

ing one construction of the constitution and laws of Michigan as to the plaintiffs in error, and another construction for other citizens of the State; and also setting out that the proceedings sought to be taken were not Due process of law, and were in violation of Section 1 of Article XIV. of the Amendments to the Constitution of the United States, in that behalf, with three specifications thereunder. The plaintiffs in error interposed these federal questions as their only defense upon this hearing. See plea and protest. (Rec., pp. 971-974.)

The plea and protest were overruled by Circuit Judge Gartner on April 17, 1893, and an order was entered to proceed with the hearing before a new jury (Rec., pp. 974-975), and the trial was ordered to proceed on September 5, 1893.

Thereupon the plaintiffs in error renewed and repeated the protest and the hearing proceeded with Circuit Judge Gartner sitting as a controlling judge and a member of the tribunal as hereinafter shown, the former protest and others raising the federal questions being made at every stage of the proceedings as the hearing went on, as hereinafter shown. (Rec., pp. 980, 1150, 1152, 1784.)

The judge refused to submit the question of necessity, and under his direction and charge, at all times sitting, the jury so impaneled returned a verdict, assessing the damages of Absalom Backus, Jr., at the sum of $15,000.00, and of A. Backus, Jr., & Sons at $48,000.00.

Then the Union Depot Company moved the said Judge Gartner that a judgment should be entered against Absalom Backus, Jr., for $2,850.00, with interest from the 23d day of January, 1892 (the date of payment of the original amount by the railroad company), and against A. Backus, Jr., & Sons for $30,293, with interest from the 23d day of January, 1892, and also a judgment against

the plaintiffs in error for costs of the second trial and costs of the appeal. (Rec., p. 1784, fol. 2985.)

Whereupon the plaintiffs in error, appearing against the entry of the judgment, formally repeated their former objections in which they had raised the federal questions heretofore referred to, claiming that the proceedings were void on those grounds, and specifying other federal questions that had arisen in the progress of the trial, including that of jurisdiction to enter a judgment at all. (Rec., p. 1786, No. 4, No. 18.)

The objections to the entry of judgment were overruled, and on December 28, 1893, Circuit Judge Gartner ordered a judgment against the plaintiffs in error, in accordance with the aforesaid motion, and taxed the costs of the defendant in error at $4,168.20. (Rec., pp. 1791-93.)

Special objection was made to the taxation of costs as being beyond even the statutory power. (Rec., p. 1794.)

Special objection was also made to the ordering of an execution, as being beyond the jurisdiction of the court, and as not, therefore, being due process of law, but the objection was overruled, and three writs of execution were issued, one against Absalom Backus, Jr., for the amount above stated, one against A. Backus, Jr., & Sons for the amount of said costs, and the other against A. Backus, Jr., & Sons for the amount of the judgment as aforesaid against them. (Rec., pp. 1796 to 1800.)

These executions were levied upon the personal property in their business of the respective plaintiffs in error, and upon thir real estate. The property in their business levied upon was all their steam engines, boilers and machines in their planing mill, and all of their lumber, manufactured and unmanufactured, in the City of Detroit, of the value of one hundred thousand dollars, and pine and hardwood lumber and other personal property belonging to Absalom Backus, Jr., of the value of ten

thousand dollars. (Rec., pp. 1797, 1798, 1800, 1801, and p. 1806.)

Whereupon, on the 26th day of June, 1894, the plaintiffs in error filed their petition in the Supreme Court of the State of Michigan (Rec., p. 1802), setting up all and singular the premises, and prayed for the writ of certiorari, wherein and whereby they set up all the federal questions as heretofore presented in the court below and others, as shown in their application for the writ at folios 3019, 3021, 3022, 3023 of Record.

This writ was allowed by the Supreme Court of the State of Michigan on June 27, 1894, and brought to that court the return of this record with the assignment of errors (Rec., 1808-1809), which assignments distinctly and specifically raise all the federal questions by specifications hereinafter discussed. (See Assignments of Error, at pages 1809 to 1815 of Record.)

The judgment and executions with the sheriff's return of seizures were taken up and error alleged upon them that they and each of them were not due process of law under the fourteenth amendment. The proceedings were wholly statutory and, of course, within the statute, must be found authority for every process and proceeding. There is no provision there for execution. There is no authority there for any judgment against a respondent citizen unless he shall have waived his constitutional right to the award paid by *appealing from it himself*, with the result of reducing the amount of the award.

There being no other questions raised except the federal questions on the last hearing, as shown by the record on certiorari, the Supreme Court of the State, in an opinion which did not refer to these questions, affirmed the proceedings below with costs on January 8, 1895.

The opinion is reported in 103 Mich., page 556.

Whereupon we come here on the allowance of the writ of error by an Associate Justice of this court made on March 15, 1895, and assign errors in this court as set out at page 1823 *et seq.* of the Record.

SUMMARY OF THE FEDERAL QUESTIONS RAISED ON THIS RECORD.

The plant of the plaintiffs in error was practically the first private property encountered by the railroad after its route left its own, or the old depot grounds, and entered River street. It was the first case for trial (R., 148), although the Railroad Company before finishing with them, proceeded with condemnations beyond them. From the beginning of the matter, when the first jury disagreed on the question of necessity, and later at the second hearing (R., p. 21) until the close, the plaintiffs in error made the contest in accordance with their rights, as hereinafter shown, on the question of the necessity of pursuing the route by their property. A majority of the second jury, as appears, was against that necessity. They believed, as was finally demonstrated at the last hearing by the results of the practical operation of the railroad enterprise on that route, that it would destroy their exceptional and peculiar business.

Their claim here is that owing to that fact, and to the further fact that anything like just compensation to them in the conditions would be extremely burdensome to the railroad enterprise, their fundamental rights were lost sight of, and under the whip and spur of the clamor for public improvements they were denied every protection guaranteed in such cases to the individual citizen by the Constitutions of the State and of the Nation.

The points will be discussed under the following heads:

I. They were denied the fundamental right to have an ascertainment and determination of the amount of compensation and its final payment before being deprived of their property.

Assignments of error, Nos. 1, 3, 5 and 6 (R., p. 1824, et seq.); Assigned in State Supreme Court, No. IV., V., XIII., XXIX. and XXXI. (R., p. 1810, et seq.); Petition for certiorari (R., pp. 1803-5-6); Set up in the trial court (R., p. 973); R., pp. 1785-1788, No. 18.

II. They were denied the protection of that guaranty of the State Constitution providing that the question of compensation and necessity should be passed upon by one and the same jury, and of the settled, uniform and unreversed construction of the Constitution to that effect by the State Judiciary in respect of all other citizens.

Assignments of error, Nos. 7, 2, 5 (R., p. 1824, et seq.); Assigned in State Supreme Court, No. VI.-I.-II.-IV. (R., p. 1810, et seq.); Petition for certiorari (pp. 1804-5-6); Set up in the trial court (R., p. 971, No. 1, p. 973-(2) (2); R., p. 1786, No. 5-6-7, p. 1788, No. 18.)

III. They were denied the protection of a trial on the questions of necessity and compensation by the Tribunal guaranteed by the Constitution of the State, in accordance with the settled, uniform and unreversed construction of that Constitution in respect of all other citizens.

Assignments of error, No. 4 (R., p. 1825); Assigned in the State Supreme Court, No. 3 (R., p. 1810), and No. 11; Petition for certiorari (R., pp. 1804-5-6); Set up in the trial court (R., p. 973, No. (1); R., p. 1786, No. 4.

IV. They were denied that measure of just compensation for their property taken, guaranteed by the Consti-

tions, Federal and State, as the same was and is accorded to all other persons than themselves.

Assignments of error No. 8 (R., p. 1827); Assigned in the State Supreme Court, No. VII. (R., p. 1811; Petition for certiorari (R., p. 1805); Set up in the trial court (R., p. 372, No. 2); R., p. 1787, Nos. 8-9-10-11, p. 1788, No. 18.

V. They were denied a hearing and deprived of a hearing guaranteed by the Constitutions, Federal and State, as "Due process of law," when summoned into court as appellees to defend their property rights and themselves from imputations upon them.

Assignment of error, No. 12 (R., p. 1828). The first three lines of this assignment of error down to the word "because" is an error in printing, they having been imported from some other place.) Assigned in State Supreme Court. No. 33 (R., p. 1815.) Petition for certiorari (R., p. 1806, bottom.)

VI. Finally, having been deprived of their property sought by the railroad company for its purposes, their personal assets of the value of one hundred and ten thousand ($110,000.00) dollars, were taken from them under the color of a judgment and process unknown to the Constitution and Statutes of Michigan, and unknown to jurisprudence, whereby they were deprived of their property without "Due process of law."

Assignments of error, Nos. 9, 10, 11, 6 (R., p. 1827); Assigned in State Supreme Court, XXXI., XXXII. (R., p. 1814); Petition for certiorari (R., p. 1806); R., p. 1785, No. 1.

Under these heads, wherever we contend that the plaintiffs in error have been denied the equal protection of the laws by discrimination, we do not appeal against the construction by the Supreme Court of the State of the Michigan Constitution or Statutes. (Merchants' Bank vs. Pa.,

167 U. S., 461; Long Isl. Water Sup. Co. vs. Brooklyn, 166 U. S., 685.) On the contrary, we appeal to that construction. We call marked attention to the fact that the record discloses that on all these questions we challenged the attention of the State Court to its own uniform and settled construction of the fundamental law and statutes involved; and that in the opinion in 103 Mich., p. 566, there is no departure from or modification of, much less a reversal of the court's settled positions in respect of any of those questions. The constitutional questions, although distinctly presented, are for the most part entirely avoided, and we appeal to and rest upon the repeated adjudications of that court where they *have been* passed upon.

On two single points cases are referred to in the opinion, but the court assumes that its decision is in line with them. It does not reverse or modify, or indicate a purpose to do so, and we will submit, after presenting the judgments of the Michigan Supreme Court, that in the absence from this opinion of any modification of or departure from their uniformity in construction of the fundamental and statute laws of Michigan, this Court will construe the language of those judgments for itself.

THE STATE COURT OPINION, 103 MICH., 556.

In limine, we submit that we come to this court under Section 709, on the final *judgment* or decree of the highest court of the State of Michigan, on a record which in that court involved nothing but the federal questions pointed out in that section. We do not come here on an appeal from the *opinion* of the Supreme Court of the State delivered in the case where such judgment was rendered. Enlightenment upon this distinction is not yet so universal as to reach the deep-seated conviction of many that if the

opinion of a state court is so framed as not to draw in question in terms the right of a citizen under the constitution and laws of the United States, then he cannot reach this jurisdiction.

Inasmuch as this record on the final judgment of the Supreme Court was a record on *certiorari*, and as the state court in its opinion in 103 Mich., page 556, treats the case, as it seems to us, precisely as if it were thereby appealed, it becomes necessary at the outset to refer briefly to that opinion in connection with the distinction in rights, jurisdiction and practice on *certiorari* in Michigan as uniformly held by its Supreme Court; otherwise, that opinion, standing by itself, might perplex, if not mislead.

From the date of the decision of the State Court of last resort on June 10, 1892, reported in 92 Mich., page 33 (from which, as has been seen, we could not have come here), the plaintiffs in error, as shown by this record, have persistently contended, by due claim and specification, that every order and direction of that judgment, and everything done under it by the Circuit Judge below, from the issuance of the mandate to the taking of their property under the writs of execution, were absolutely void for want of jurisdiction, on two general grounds; (one), because in and by such proceedings the plaintiffs in error were denied the equal protection of the laws by the State of Michigan, in violation of Section I. of Article XIV. of the Constitution of the United States; and (two) because by the said proceedings the plaintiffs in error had been deprived of their property without due process of law, in express violation of the same section and article of the Constitution of the United States.

Careful specifications under these two general heads, as has been seen, appear by this record at every stage of the proceedings, from the decision in 92 Mich., p. 33, on

June 10, 1892, until the only decision from which we could appeal to this court was made on January 8, 1895, —103 Mich., 556.

Even the testimony that was taken in behalf of the plaintiffs in error under protest, as shown by the record, was taken, as shown, to bring out this question of jurisdiction, raised immediately after the decision on the appeal case, to wit:

That the Supreme Court of the State and the court below, under its direction, had adopted a rule as to compensation which was not only in violation of the Constitution of the State, but discriminated against the plaintiffs in error by denying them, and denying *them only*, the rule and measure of just compensation accorded to all other citizens of the State.

These jurisdictional questions going to the validity of all the proceedings were set up in the court below at every stage of the proceedings, as the proper practice required, as held in Spies case, 123 U. S., pp. 131-181, and in Oxley vs. Butler, 166 U. S., 648; and these questions alone were presented in the petition to the Supreme Court for the writ of certiorari, which was allowed, and in the assignments of error, argued as shown on the Record, on which the opinion in the 103 Mich., 556, was rendered.

We now quote from that opinion, so far as we desire to comment upon it in this place in connection with the distinction above referred to:

"This case is now before us for the third time. It was "commenced February 7, 1891. The first jury disagreed. "The second jury found a verdict for the respondents of "$96,143. This verdict was set aside by the Circuit Court "in which the proceeding was tried. The respondents "applied to this court for the writ of *mandamus* to set "aside this order. (89 Mich., 209.) The case was after- "wards brought to this court by appeal and is reported

"in 92 Mich., 33. After that decision the case was again "tried before a jury, resulting in a verdict for Absalom "Backus, Jr., for $15,000, and for A. Backus, Jr., & Sons "for $48,000. For a full statement of the case, refer- "ence is had to the former decisions. The case is now "brought before us on a writ of *certiorari*, and substan- "tially the same questions are involved and argued as "are stated in the opinion in 92 Mich. No motion was "made for a rehearing of that decision. The case was "remanded for a new trial, under the rulings then made. "The respondents will not be heard upon the questions "then decided, and we shall not argue them. By enter- "ing upon a new trial without a motion for a rehearing, "both parties adopted that decision as the law of the "case, and conducted the trial under it. All these ques- "tions are therefore *res judicata*, and not now open for "review. That case was very ably and fully argued by "counsel, and received the most careful consideration by "the Court, of which four of the present members were "then members. A re-examination shows no reason for "doubting the soundness of the conclusions then reached.

"We will now proceed to determine some questions "which were not fully disposed of on the former hearing.

"Complaint is made because the Circuit Judge presided "at the trial, ruled upon questions of evidence, and "charged the jury. No errors are assigned upon his rul- "ings on either the admission or rejection of evidence."

* * * * * * * * * *

"The fact that no errors are assigned upon his rulings "upon the testimony removes that question from discus- "sion. The judge, in both his rulings and his charge, "was very careful not to encroach upon the functions of "the jury. The charge was so clear, so appropriate to "an important litigation (which had been conducted with great ability and vigor on both sides), and so carefully

"guarded the rights of both petitioner and respondents,
"that we here give it in full."

* * * * * * * * * * *

"It is proper here to note that no requests to charge
"were presented on behalf of the respondents."

These quotations from an opinion rendered in a case in that court on certiorari—not on error or appeal!

Now, the Supreme Court of the State, unlike the lower courts on certiorari to Justices' Courts, gets its jurisdiction to issue the writ from the Constitution of the State of Michigan, and not by statute—Specht vs. Detroit, 20 Mich., 168; Lantis case, 9 Mich., 324; Farrell vs. Taylor, 12 Mich., 113.

In Michigan, the writ of certiorari is confined to cases raising questions of jurisdiction, especially in statutory proceedings like this, and to cases of imprisonment. The facts or mere errors in ruling cannot come up for review, neither can mere irregularities.

The Supreme Court of the State in 50 Mich., 88, through Justice Cooley, said: "It is not a flexible rem-
"edy. All we can do under it is to quash or refuse to
"quash the proceedings."

In Dunlap vs. Toledo R. R., 46 Mich., 190 (which was certiorari from condemnation proceedings like this), the proceedings were quashed on certiorari. The court, through Judge Campbell, said: "It is objected that cer-
"tiorari is an improper remedy, and that resort should
"have been had to an appeal. While it is true that cer-
"tiorari should not be favored where any other remedy is
"adequate, it will undoubtedly lie for want of jurisdic-
"tion."

In Lake Shore R. R. vs. Hunt, 39 Mich., 470, it was held by Judge Cooley that certiorari was the appropriate remedy to get rid of a void judgment.

In Farrell vs. Taylor, 12 Mich., 113, Judge Campbell held that only jurisdictional questions, and nothing on the merits can be disposed of on certiorari.

In Specht vs. Detroit, 20 Mich., 171, Justice Graves, delivering the opinion, held that the authority of the Supreme Court to issue this writ results "from the con-"stitution and cannot be taken away by legislative en-"actment;" affirming the 12 Mich., 113, supra, where the proceedings were quashed for want of jurisdiction. Wilson vs. Bartholomew, 45 Mich., 41.

In Withington vs. Southworth, 26 Mich., 381, which was originally a proceeding before a justice, it was contended that certiorari would not lie from the Supreme Court because there is a statutory remedy by appeal or certiorari to the Circuit Court from the justices. Judge Cooley held that notwithstanding the statutory remedy by certiorari referred to was gone by limitation of time, the Supreme Court had jurisdiction to bring up the proceedings by certiorari, and to hold the judgment void for want of jurisdiction. See Lantis Case, 9 Mich., 323. Gentle vs. Board, 73 Mich., at page 46. Held that irregularities are not considered.

Questions which do not go to the jurisdiction are not considered on certiorari—condemnation case, G. R. R. R. vs. Weiden, 69 Mich., p. 580, and see Ryerson vs. Brown, 35 Mich., 332.

(1) To clear the way for the discussion of the fundamental questions here, it is thus necessary to point out that the opinion of the State Court, in its opinion upon the record involving the same questions, is incongruous and confusing. Such points as are there discussed, as if it were a case at common law or in equity, are, as we have seen by the Michigan authorities, radically irrelevant, and cannot be considered on a common law certiorari like this. No new trial was sought or could be sought in the case by plaintiffs in error.

(2) "Substantially the same questions" could *not* be involved as are stated in the opinion in 92 Mich., 33.

(3) The respondents could not conceive before the actual delivery of the opinion in 92 Mich., 33, that the State Court would give directions to the court below which from our point of view would render the proceedings void as repugnant to the Constitution of the United States, or that, without rehearing, it would, in its ultimate decision in 92 Mich., 33, reverse its unanimous judgment in 89 Mich., at page 209, in a case between the same parties.

(4) Naturally, "no errors were assigned" upon mere errors of law, or upon anything except jurisdictional questions. Indeed, in another condemnation case instituted by this defendant in error, the same court, by the same learned judge who wrote this opinion, delivered this unanimous opinion: "These proceedings may be in-"stituted in probate court, the judges of which "are frequently not lawyers, and are unfamiliar with the "rules of evidence. If they were to be set aside on ac-"count of errors in the admission or rejection of testi-"mony, the difficulty of obtaining a finding by the jury "which could stand the test would be apparent" (Union Depot Company vs. Jones, 83 Mich., 418), and in which case the same learned judge quoted from the opinion of the same court delivered by Mr. Justice Campbell in Toledo R. R. vs. Dunlap, 47 Mich., 456, wherein it was said:

"Under our constitution such powers as are strictly "judicial in their character can only be vested in certain "courts which are named in the constitution itself. The "circuit courts—as courts—have such powers. The "judges, as judges, out of court, do not possess them, and "cannot be vested with them. The proceedings to con-"demn lands, although made under the railroad laws, "subject to judicial review and supervision for certain

"purposes, are not in themselves and never have been "regarded as judicial proceedings."

* * * * * * * * * * *

"If a jury has been summoned under proper circum- "stances, has conducted its inquiries legally, and with "due regard to private rights, and has reached a legiti- "mate conclusion as to the necessity of the condemnation "and the compensation, the appropriation of the land, "upon payment of that compensation, will be lawful, and "will not be affected by collateral action by the judge or "court, which may be unlawful. This distinction between "the different tribunals is essential." * * * "*The "judge formed no part of this special tribunal.* The stat- "ute indeed allows the judge to 'attend said jury, to de- "'cide questions of law and administer oaths to wit- nesses.'" * * * "Whatever the language of this "statute literally construed may mean, it is very clear that "any such functions must at most be advisory. *The jury "will undoubtedly be regarded as accepting and doing "what they permit to be done.* But in all such cases the "Constitution as well as the principles of the common "law, makes them judges of law and fact. Their conclu- "sions are not based entirely on testimony."

And the same court, through Judge Cooley, said, in a similar condemnation proceeding, in Detroit R. R. vs. Crane, 50 Mich., 182, that, "We have examined the record "in the light of these objections, and it seems highly "probable that if the evidence had been taken under strict "legal rules, some which was received would have been excluded. * * * But we have shown in previous "cases that we cannot set aside these awards for such a reason. * * * The statute plainly assumes that the "jury may conduct the inquiry *without the aid of any legal "expert.*"

In a condemnation case—Peninsular R. R. Co. vs. Howard, 20 Mich., 18, the same court, through Justice Christiancy, said that in condemnation proceedings "the jury "act in effect as judges in the absence and *beyond the con-"trol of the court.*"

The same court said, speaking through Mr. Justice Campbell, in Railroad Company vs. Chesebro, 74 Mich., 471:

"We held in Toledo, etc., Railway Company vs. Dunlap, "47 Mich., 456, where the jury was impaneled in a circuit "court, that the only functions of the court were to set the "proceedings in motion by organizing a jury or appoint-"ing commissioners, and affirming or vacating the award; "and we held, further, that the jury were judges of law "and fact, and *not subject to interference by the judge*, should "he undertake to accompany them. The statute, which "probably was in this respect borrowed from some other "region, while it does authorize a judge to go with and "decide questions of law and swear witnesses, also allows "him to deputize a circuit court commissioner to do the "same thing. *It would be absurd to consider such action as "valid judicial action. It was held there, as it has been uni-"formly held, that the jury cannot be made subject to any such "instruction*, and must act on their own judgment."

(5) To the statement in the opinion that "no requests "to charge were presented in behalf of the respondents," in addition to the foregoing as to the nature of the procedings, we beg to quote from the unanimous judgment of the same court in the case of F. & P. M. R. R. vs. D. & B. C. R. R., 64 Mich., at page 363, the following:

"I do not consider that any error was committed by "the Court in refusing to instruct the commissioners at "the request of the respondents. The Court might have "done so had it thought proper. But it was not a duty "imposed by law, *and its instructions would not have been*

"binding upon the commissioners had it done so. This has "been settled by our previous adjudications, which were "based upon satisfactory reasoning, and I see no good "object to be accomplished in overruling them."—(Citing at length Michigan cases holding the same doctrine as to juries.)

(6) As to the statement in the opinion that no rehearing was applied for after the decision in 92 Mich., 33, and as to the conclusiveness of that judgment upon the plaintiffs in error for that reason, we respectfully submit our understanding that the only jurisdictional defect that may be so waived is one going to the jurisdiction of the person. A failure of jurisdiction in matter of substance in statutory proceedings going to the bottom of the jurisdiction on fundamental and constitutional grounds, cannot well be waived by appearing before the statutory tribunal under protest, setting up the distinct grounds of total failure of jurisdiction, especially when it is essentially necessary to so enter the tribunal to enable the party to specify the fundamental questions before it in order to invoke the protection of the Constitution of the United States before this tribunal.

Therefore the statement that the decision in 92 Mich., 33, is *res judicata* as to the questions raised on the certiorari in 103 Mich., 566, and brought here, requires no comment.

The doctrine of *res judicata* does appear in this case in connection with the reversal of the unanimous judgment of the Court in this case in 89 Mich., 209, by the Court in 92 Mich., 33, without a rehearing, and it will be pointed out, under the uniform decisions of the Supreme Court of Michigan, except as to these plaintiffs in error, that in respect of it, this is assigned as error below and here as one of the fatal objections to the proceedings, as not being due process of law.

THE PROVISIONS OF THE MICHIGAN CONSTITUTION AND THE STATUTES THEREUNDER.

The provisions for the taking of private property in the Constitution of 1851 are unlike those of other states, as will be seen from the Michigan cases to be reviewed, and the statutes under them, as will be seen by the same cases, are incongruous and in many respects fatally inconsistent with the fundamental law.

The following are the provisions of the Constitution to be considered:

Article XVIII., Section 2. "When private property is "taken for the use or benefit of the public, the necessity "for using such property, AND the just compensation to "be made therefor, except when to be made by the State, "shall be ascertained by a jury of twelve freeholders, "residing in the vicinity of such property, or by not less "than three commissioners, appointed by a court of rec- "ord, as shall be prescribed by law."

Article XV., Section 15. "Private property shall not be "taken for public improvements in cities and villages "without the consent of the owner, unless the compensa- "tion therefor shall first be determined by a jury of free- "holders, and actually paid or secured in the manner pro- "vided by law."

Article XV., Section 9. "The property of no person shall "be taken by any corporation for public use without com- "pensation being first made or secured, in such manner as "may be prescribed by law."

The Supreme Court of Michigan has uniformly held that Sections 9 and 15 of Article XV. of the Constitution must each be read, construed and controlled by the first provision above quoted, Section 2 of Article XVIII.

So held in Campau vs. Detroit, 14 Mich., 283; People vs. Brighton, 20 Mich., 69; Paul vs. Detroit, 32 Mich., 108; Horton vs. Grand Haven, 24 Mich., 465; Arnold vs. Decatur, 29 Mich., 77; and as to condemnation proceedings, Marquette R. R. vs. Probate Judge, 53 Mich., 226; Grand Rapids R. R. vs. Weiden, 70 Mich., 393, and cases cited *infra.*

In construing Section 2 of Article XVIII., which is universally held to apply to condemnation proceedings, the Supreme Court of Michigan (Cooley, Campbell and Graves, JJ.) said of it in Paul vs. Detroit, 32 Mich., at page 113: "This provision is not found in constitutions "generally, and was never known in Michigan until the "adoption of the Constitution of 1851. Before that, nei- "ther jury nor commissioners had any duty to perform "except assessing damages, and the prerogative of taking "property on their own estimate of its necessity was exer- "cised by legislatures or those persons or corporations "whom they allowed to act in the matter.

"The change was made from a well founded belief, "founded on experience, that private property was often "taken improperly and without any necessity."* * * * "The sacredness of private property, and its immunity "from any interference not required by actual public exig- "encies, ceased to be respected.

"The Constitution has changed this by requiring the "whole subject to be determined by a jury of freehold- "ers; so that each case shall be determined by a separate "tribunal summoned expressly for the purpose, who must "be unanimous in their views before any land can be "taken; who must act openly and before all concerned, in "hearing and receiving testimony." * * * "The fact "that the rules formerly existing here, and still in force "elsewhere, vesting the discretion of passing upon neces- "sity in other hands, are not applicable, has been disre-

"garded, and statutes regulating the condemnation of "lands are copied or patterned after laws belonging to a "different system, or patched and interwoven with incon- "sistent and incongruous provisions, which render them "obscure and ambiguous."

In Toledo R. R. vs. Dunlap, 47 Mich., at p. 461, the Court refers to the railroad condemnation statute in these words: "The statute is evidently framed in accordance "with the laws of some other states where the judicial "power is not parcelled out as it is here."

In Railroad vs. Chesebro, 74 Mich., at p. 471, the Court refers to the condemnation statute as "borrowed from "some other region."

In fact, the statute under consideration in respect of the proceedings for condemnation was borrowed from the State of New York, where it was framed under the following provision of New York's Constitution, radically different from ours: Constitution of 1846, Article I., Section 7:

"When private property shall be taken for any public "use, the compensation to be made therefor, when such "compensation is not made by the state, shall be ascer- "tained by a jury, or by not less than three commission- "ers appointed by a court of record as shall be prescribed "by law." (General Statutes of New York, Blatchf. Edition, 1829-51, Appendix, page iv.)

The State Supreme Court and the counsel here to sustain some of its rulings, cite the New York authorities on the statute enacted under this provision.

Among other radical distinctions, three should be noted: (One) The New York law permits a taking before compensation shall be first determined and paid; (two) It does not provide that the question of necessity shall be passed upon by a jury or commissioners at all; (three) It does not provide that the question of compen-

sation and the question of necessity shall be passed upon by the same jury. (Matter of the N. Y. C. R. R., 66 N. Y., 409.) And see Cooley, J., Chicago R. R. vs. Sanford, 23 Mich., at p. 423.

The Union Depot act of Michigan (1 How. Ch., 93) under which the condemnation proceedings were taken in this case, as to the forms and method of procedure for the taking of private property, reproduces the general railroad act practically verbatim (1 How. Comp., Sec. 3332 *et seq.*).

The repeated construction of the above provisions of our Constitution by the Michigan Supreme Court has been for the most part directed at the latter statute, but the Union Depot act, doubtless in view of those decisions, does contain the following provision, differing in phraseology from that in the general railroad act (and it bears directly upon the conditions in this case).

§ 3461. * * * "And in case of the construction of "such tracks on any public street, lane, alley, or high- "way, the same shall be on such terms and conditions "as shall be agreed upon between the company and the "common council of any city, or the village board of "any village, or the commissioner of highways in any "township in which the same may be; *provided, that such "tracks shall not be constructed on any public street, lane, alley, "highway, or private way, until compensation be made by the "company therefor to the owner or owners of property adjoin- "ing such street, lane, alley, highway or private way, and oppo- "site where such tracks is to be constructed, either by agreement "between the company and each owner, or ascertained and paid "as hereinafter prescribed for obtaining property or franchises "for the purpose of its incorporation."*

The essential part of the Union Depot statute to be considered, after providing that commissioners may act, if no jury be demanded, is as follows:

§ 3466—Sec. 9. "The commissioners shall take and "subscribe the oath prescribed by article eighteen of the

"Constitution. Any of them may issue subpoenas, ad-
"minister oaths to witnesses, and a majority of them may
"adjourn the proceedings before them from time to time
"in their discretion. Whenever they meet, except by ap-
"pointment of the court or judge, or by previous adjourn-
"ment, they shall cause reasonable notice of such meet-
"ing to be given to the parties who are to be affected by
"their proceedings, or the attorneys or agents of such
"parties. They may view the premises described in the
"petition, and shall hear the proof and allegations of the
"parties, and shall reduce the testimony, if any is taken
"by them, to writing, if requested to do so by either party,
"and after the testimony is closed in such case, and with-
"out any unreasonable delays, and before proceeding to
"the examination of any other claim, all being present
"and acting, shall ascertain and determine the necessity
"of taking and using any such real estate or property
"for the purposes described; and if they deem the same
"necessary to be taken, they shall ascertain and deter-
"mine the damages or compensation which ought justly
"to be made by the company therefor to the party or par-
"ties owning or interested in the real estate or property
"appraised by them. They shall also determine and cer-
"tify what sum ought to be paid to the general or special
"guardian of an infant, idiot, or person of unsound mind,
"or to said court, to be held for an unknown party in
"interest not personally served with notice of the pro-
"ceedings, and who has not appeared, for damages and
"cost or expenses and counsel fees. They shall make a
"report to said court or judge, signed by them, of the
"proceedings before them, if any, which may be filed with
"the clerk of the court, either in vacation or term time, or
"the probate court, as the case may be. Said commis-
"sioners shall be entitled to two dollars a day for each
"day they are engaged in the performance of their duties,
"to be paid in the first instance by the company.

"In case a jury shall have been demanded and ordered
"by the court, pursuant to section eight of this act, the
"said jury shall proceed to ascertain and determine the
"necessity of taking and using any such real estate or
"property, and the damage or compensation to be paid
"by the company therefor, in the same manner and with
"like effect as is provided in this section in the case of
"commissioners, and as is further provided in said sec-

"tion eight; but they shall all be present and act together "during the proceedings, and before acting shall take and "subscribe an oath that they will justly and impartially "ascertain and determine the necessity of taking and "using any such real estate or property for the purposes "proposed; and if they deem the same necessary to be "taken, will ascertain and determine the damages or com- "pensation which ought justly to be made by said com- "pany to the owners of or persons interested in each par- "ticular description of real estate mentioned in said peti- "tion who have demanded said jury; and they shall be "entitled to two dollars for each day they are engaged in "the performance of their duties, to be paid in the first "instance by the company. The said judge, or a circuit "court commissioner to be designated by him, may attend "said jury, to decide questions of law and administer "oaths to witnesses, and he may appoint the sheriff or "other proper officer to attend and take charge of said "jury while engaged in said proceedings. And the jury "shall proceed to determine the amount of damages to be "awarded, and shall have all the powers hereby conferred "upon commissioners; and a report signed by the jury, "whether the judge is or is not in attendance, shall be "valid and legal. At any time before the report of the "jury or commissioners shall be made to the court, it "shall be competent for the company, after sufficient "cause has been shown and with leave of the court, to "discontinue all pending proceedings in any case and to "institute new proceedings at any time thereafter; but "the company in all such cases shall pay all the costs "of all proceedings so discontinued, with an attorney fee "to be taxed as in cases at law.

§ 3467—Sec. 10. "On such report being made by the "commissioners or jury, the court, on motion, shall con- "firm the same on the next or any subsequent day when "in session, unless for good cause shown by either party; "and when said report is confirmed, said court shall make "an order containing a recital of the substance of the "proceedings in the matter of the appraisal, and a de- "scription of the real estate or property appraised, for "which compensation is to be made, and shall also direct "to whom the money is to be paid, or when and where it "shall be deposited by the company. Said court, as to

"the confirmation of such report, shall have the powers "usual in other cases.

§ 3468.—Sec. 11. "A certified copy of the order so to "be made shall be recorded in the office of the register "of deeds for said county, in the book of deeds; and there- "upon, on the payment or deposit by the said company of "the sum to be paid as compensation for such land, fran- "chise, or other property, and for costs, expenses, and "counsel fees as aforesaid, and as directed by said order, "the company shall be entitled to enter upon and take "possession of and use the said land, franchise and other "property for the purpose of its incorporation; and all "persons who have been made parties to the proceedings, "either by publication or otherwise, shall be divested and "barred of all right, estate, and interest in such real es- "tate, franchise, or other property, until such right or "title shall be again legally vested in such owner; and all "real estate or property whatsoever acquired by any "company under and in pursuance of this act, for the pur- "pose of its incorporation, shall be deemed to be acquired "for public use:

"*Provided*, the said sum to be paid as damages and com- "pensation, and costs, expenses, and counsel fees as afore- "said, shall be paid by the company, or deposited as pro- "vided in this act, within sixty days after the confirma- "tion of said report by the said court; and in case said "company fail or neglect to do so, such failure or neglect "shall be deemed as a waiver and abandonment of the "proceedings to acquire any rights in said land or prop- "erty. Within twenty days after the confirmation of the "report of the commissioners or jury, as above provided "for, either party may appeal, by notice in writing to the "other, to the Supreme Court, from the appraisal or re- "port of the commissioners or jury; such notice shall "specify the objections to the proceedings had in the "premises, and the Supreme Court shall pass on such ob- "jections only, and all other objections, if any, shall be "deemed to have been waived; such appeal shall be heard "by the Supreme Court at any general or special term "thereof, on notice thereof being given according to the "rules and practice of the court. On the hearing of such "appeal, the court may direct a new appraisal before the "same or new commissioners or jury, in its discretion. "The second report shall be final and conclusive upon all

"parties interested. If the amount of the compensation "to be allowed is increased by the second report, the dif- "ference shall be a lien on the land appraised, and shall "be paid by the company to the parties entitled to the "same, or shall be deposited as the court shall direct; and "in such case, all costs of the appeal shall be paid by the "company; but if the amount is diminished, the difference "shall be refunded to the company by the party to whom "the same may have been paid, and judgments therefor "and for all costs of the appeal shall be rendered against "the party so appealing. On the filing of the report, such "appeal, when made by any claimant of damages, shall "not affect the said report as to the right and interests of "any party, except the party appealing; nor shall it "affect any part of said report in any case, except "the part appealed from; nor shall it affect the possession "of such company of the land appraised; and when the "same is made by others than the company, it shall not "be heard except on a stipulation of the party appealing "not to disturb such possession during the pendency of "such proceedings."

§ 3463.—Sec. 6. "In case any such company is unable "to agree for the purchase of any real estate, property or "franchises required for the purpose of its incorporation, "it shall have the right to acquire the title to the same in "the manner and by the special proceeding prescribed "in this act; but there shall be no power, except for cross- "ing, to take the track or rights of way of any other rail- "road company without the consent of said railroad com- "pany."

At the same session of the legislature that passed the Union Depot act (1881), but not added on in form as a part of that act, the following act was passed, drawn by the promoter of the Union Depot Company—Mr. Joy—as appears by this record:

§ 3357.—Sec. 44. "When any part of the land of any "railroad company in this State, in or adjacent to its "depot grounds is not in actual use for depot or other pur- "pose pertaining to the operation of a railroad, and such "land is not needed by said railroad company for the "purpose of a depot or other terminal facilities, it shall

"be lawful for any other railroad company organized as "aforesaid, needing such land for the purpose of a depot "or terminal facilities, to acquire the same in the same "manner as may now be done for such purpose from in- "dividuals. The question of actual use and of necessity "for the aforesaid purposes by said railroad company "owning and not using said land, shall be determined in "addition to other questions as provided by law in cases "of condemnation of lands for the purpose aforesaid, and "the same proceedings in all respects, as near as may be, "shall be had for the aforesaid purpose as now provided "by law where land is acquired for such purpose from in- "dividuals."

1.—THEY WERE DENIED THE FUNDAMENTAL RIGHT TO HAVE AN ASCERTAINMENT AND DETERMINATION OF THE AMOUNT OF COMPENSATION AND ITS FINAL PAYMENT BEFORE BEING DEPRIVED OF THEIR PROPERTY.

The record that went to the Supreme Court of the State in the case reported in 92 Mich., p. 33, covered the proceedings had upon the first verdict up to December 2nd, 1891, when the appeal in that case was taken, and ends at page 948 of the Record. Up to that time, while the plaintiffs in error contended that the railroad company had possessed itself of the property sought to be condemned, yet it was contended by defendants in error, and held by the Circuit Judge of that possession, that "The occupancy by the petitioner of the half of the street "has not been for any such purpose as contemplated by "the proceedings, nor has such occupancy been under "such proceedings. This, as is shown, petitioner has care- "fully endeavored to avoid. The entry, as well as the "occupancy, was under the authority granted by the City "of Detroit for a temporary purpose only, and not for the "purpose of erecting in front of respondents' lands the "aqueduct or superstructure contemplated by the insti- "tution of the proceedings, and the right to erect, which

"was sought to be obtained under and by virtue of such "proceedings. The right of the city to give licenses to "occupy the streets is provided by ordinance," etc., etc. (R., p. 897.)

Thus it may be admitted that that possession was then a qualified possession, but by the subsequent proceedings, appearing by the record and the hearing below, it is shown beyond question, as has been seen, that in January, 1892, the railroad company took complete possession of everything sought by its petition, built its permanent structures, laid its tracks, and that at the outset of that proceeding, when the plaintiffs in error set it up in bar by their sworn plea on April 14, 1893 (R., pp. 971-973), the railroad company had maintained and operated the railroads upon the property taken for the period of a year; that the freight and passenger business of four trunk lines (the Wabash, the Canadian Pacific, the Flint & Pere Marquette, and the Detroit, Lansing & Northern) was passing over it continuously. The magnitude of the operations of the road was demonstrated in detail without challenge in any way, at length at p. 1229 and following of the record.

It has been seen that the railroad company itself moved for the confirmation, obtained it, and paid the amount of the verdict unconditionally to the plaintiffs in error in January, 1892. (R., pp. 1151-1152.)

If the statute itself had provided for possession before a final assessment of the amount and final payment of the compensation, such a statute, as we shall show by the uniform construction of the State Constitution by the Supreme Court itself, would be unconstitutional, but the statute *provides* for no such thing.

Section 10 and the first part of Section 11 are provisions only (and they are the only provisions for that purpose

in the entire statute) for the final passing of the title *on the conclusion* of the condemnation proceedings. The appeal provision, copied from the General Railroad Act, although "inartificially" and "carelessly" framed, as frequently stated by the Court, *does assume* that after a confirmation, which he may not prevent (and it *assumes* that it may have been taken after he has received the money), he may waive his constitutional title to the money, even if possession has been taken on payment, and appeal; and that in that case, he must abide the result of the second trial, and refund if the award shall be decreased. But there is no provision for possession in the statute, *and even that is not even assumed by the statute in case of an appeal by the condemning corporation.*

Indeed, the statute makes a futile attempt to compel him as a condition of appeal to waive his right to possession by a "stipulation." (Last paragraph Sec. 11.)

The constitutional provision in Michigan (Art. XV., Sec. 9) is imperative that compensation shall "first" be made before the taking, and § 3461 of the Union Depot Act, heretofore quoted, is specific that the railroad shall not be constructed "until compensation be made" by the company therefor to the owner or owners of the property, "and *paid* as hereinafter prescribed."

And as Art. XVIII., Sec. 2, is uniformly held to be a further limitation upon railroad condemnations, the necessity, as well as the amount of the compensation, must of course be ascertained as a prerequisite of a "taking."

There is no such phrase "or secured" in the statute, and wherever that term is used, it is in reference to settling disputes about title to the fund, and like questions, as provided in every railroad act and in this act. (See Sec. 12 and following.) (R. R. vs. Clark, 23 Mich., 523, top.)

In the whole history of juridical procedure it was never before suggested that under a provision for an assessment

of an amount to be paid or secured as a precedent condition to an end sought, that its payment or security could take place until the amount was fixed, and finally fixed.

The right of payment and of final payment before a "taking" is fundamental.

This court said, in Bauman vs. Ross, 167 U. S., pp. 548-598: "Under the Constitution, and by the express pro-"vision of Section 18 of this act, the United States are "not entitled to possession of the land until the damages "have been assessed and actually paid. The payment of "the damages to the owner of the land and the vesting of "the title in the United States are to be contemporane-"ous."

In Michigan it is held that notwithstanding the general railroad statute provided for the deposit of money in bank, the deposit was not sufficient to entitle the condemning party to possession. "In regard to the deposit of money in bank" (pending an appeal) "the statute has no provision which would com-"pel the landowner to take the risk of any deposit or de-"prive him of his rights *until he is paid.*"—Campbell, J., for the Court in R. R. vs. Dunlap, 47 Mich., at p. 464. And in that State the rule is strictly enforced under the exceptional provisions of our Constitution.

The Supreme Court of the State has made short work of arguments based on any supposed implications of the statute.

In Railroad vs. Chesebro, 74 Mich., at p. 468, that Court, speaking through Mr. Justice Campbell, said:

"There can be no doubt, under our decisions and under "the Constitution of this State, that there can be no pos-"sessory right in a railroad company adverse to the real "owner, without either a license or a payment or tender "after a valid condemnation. It is a land-owner's abso-"lute right not to be disturbed in his freehold. No Court

"has the right to divest possession in advance of condem-
"nation *or to legalize it*"—citing cases.

In Detroit R. R. vs. Probate Judge, 63 Mich., 676, the proceedings were in the Probate Court and under the statute here involved, the proceedings may be instituted in either the Probate or the Circuit Court.

Chicago R. R. vs. Sanford, 23 Mich., at p. 427: "He can-
"not be compelled to yield up a right of way until it has
"been declared by competent and impartial authority
"necessary, nor if necessary, *until his compensation has*
"*been fixed.*" (Campbell, J.)

In reviewing similar statutes under the general rail-road law, the Court, in Derby vs. Gage, 60 Mich., at page 4, said: "These proceedings are purely statutory, and
"the remedies therein provided are exclusive, and cannot
"be extended byond those contained in the act. The stat-
"ute places the damages and compensation awarded by
"the jury or commissioners, and costs and counsel fees
"upon the same footing, and unless these are all paid
"within the sixty days, the title of the owner is not di-
"vested and does not vest in the company."

In Toledo R. R. vs. Dunlap, 47 Mich., at page 461, the statement in the opinion as to the conditions in respect of the question here is as follows: "It appears that im-
"mediately after the confirmation of the proceedings,
"which were afterwards set aside by this Court, the com-
"pany took possession of Dunlap's land, and built its
"road across the part sought to be condemned. This was
"done in December, 1880, and led to a series of legal con-
"troversies not yet determined." * * * "The statute
"is evidently framed in accordance with the laws of some
"other States where the judicial power is not parceled out
"as it is here." * * * "It is greatly to be regretted
"that this species of legislation has been so carelessly
"framed."

At page 464 the Court says that "The necessity of tak-"ing, as well as the amount of compensation, must be *de-"termined* before land can be taken." * * * "He (the "land-owner) cannot be compelled to determine at his "peril whether a jury will regard the land as necessary "for public use, and he cannot be in fault for refusing a "tender when he can have no assurance that the proposed "improvement will be sanctioned. But the statute is "fatally defective if such an infliction could be imposed, "because it provides no means and no tribunal for deter-"mining the question of tender."

In Paul vs. City of Detroit, 32 Mich., at page 113, the Court, in construing Article XVIII., Section 2, which is there applied and held to be binding in cities and villages as to streets, in connection with Article XV., Section 15, discusses the historical reasons for its adoption, and says at pp. 118-119: "Until the jury determine, not only that "the improvement is desirable, but that it is worth to the "public or to the parties chargeable all they must sever-"ally pay to fully remunerate the owner, the necessity "cannot be established, and the property cannot be law-"fully taken." * * * "And it can never be lawful to "compel any man to give up his property, when it is not "needed, or to lose it, whether needed or not, without be-"ing made whole." * * * "Any system may have its "defects, but all of the constitutional rules must be pre-"served and enforced."

But even the almost exact conditions involved here have been passed upon in construing the constitutional provisions in reference to this statute. In Michigan, under Section 10 of this Act, after the verdict of the jury, the only office of the Circuit Judge is to confirm or refuse to confirm. If he confirms, and there is no appeal, he has the powers as to such confirmation usual in other cases. If he refuses to confirm, there is no provision for appeal,

and the remedy is, on the record as presented to the Circuit Judge for confirmation to apply to the Supreme Court of the State for mandamus to compel confirmation. Or, because of an exigency, or urgency, the Supreme Court may be applied to by certiorari or mandamus to set aside an improper confirmation. Proceedings before commissioners and jury are treated on the same footing in the statutes and by the courts. The record that is in any case presented to the Supreme Court is that which is presented to the judicial officer below before confirmation.—Peninsular R. R. vs. Howard, 20 Mich., 24; R. R. vs. Voorhies, 50 Mich., 506.

In 53 Mich., 217—Marquette R. R. vs. Probate Judge, an unanswerable case was made against confirmation before the *nisi prius* judge. In that case objections were filed before the lower court, setting up that the damages and compensation found by the commissioners were excessive and exorbitant; that there were included a large number of grossly improper items, specifying them; that the commissioners arrived at the total award by agreeing to add together the several sums arrived at, and divide the sum by three and make the quotient their award, and that the commissioners received private information from the respondents in the case undisclosed to the railroad company.

The Supreme Court says of the grounds of objections to the confirmation, that there were sufficient grounds for setting aside the report (p. 222). The court below, having refused to receive affidavits and testimony in support of a motion to set aside the report, the railroad company applied to the Supreme Court of the State for a mandamus to compel their reception and to set aside the confirmation.

The order to show cause was granted, and the Supreme Court states (p. 224) that on the showing there would have

been no hesitation in granting a peremptory mandamus. But the railroad company desired immediate possession, and as in this case, pending the proceedings, appeared in court, and itself "moved to confirm the report of the "commissioners, protesting (unlike this case), nevertheless, that the award was unjust, exorbitant, unwarranted "and illegal, and praying that the motion might not in "anywise prejudice the petitioner's right to question and "attack said report on appeal, or by other proper proceeding, and not waiving or in anywise relinquishing or "impairing the motion theretofore made for an order to "the Court to show cause why said report should not be "set aside." And thereupon the Probate Judge ratified the report of the commissioners and the confirmation.

The railroad company then "paid the amount of the "award" to the respondents, "under protest, and stated "that the petitioner reserved all its rights to recover the "same or any part of the same back, should said award "be set aside, diminished or quashed by proceedings had "theretofore upon the same, and all other rights that it "had or may have for the recovery of said money or any "part thereof, and that the money was paid then because "the railroad company *needed the land for the purpose "of building its track thereon at once, and further delay "in acquiring that right would result in great loss to it "and inconvenience to the public.* The petitioner went into the immediate possession of the land. Afterwards the railroad company dismissed the appeal on the ground that it was taken through inadvertence and resumed the proceeding by mandamus.

The Court comments upon this record as follows: "Un-"der these circumstances the order of confirmation and "the proceedings based thereon cannot be disturbed. The "Constitution expressly provides: 'The property of no "'person shall be taken by any corporation for public use

"'without compensation being first made or secured, in "'such manner as may be prescribed by law.' Art. XV., "Sec. 9. Another provision of the Constitution requires "the necessity for taking the property for the public uses "as well as the compensation, to be ascertained by a jury "or commissioners. *These requirements are conditions "precedent to the taking, and must first be complied with "before an individual can be compelled to part with the " title or possession of his property. 'Compensation is a " 'constitutional condition of such taking, and it can only " 'be lawful when the necessity of the taking, as well as " 'the measure of compensation, has been determined in " 'a legal way.'* (Sheldon vs. Kalamazoo, 24 Mich., 386.) "The effect of setting aside the report of the commis- "sioners would be to leave the compensation undeter- "mined, and the owners divested of their property.

"The necessities of the corporation for the immediate "use of the land for the purpose of constructing its road "are not sufficient to nullify these constitutional safe- "guards to the rights of private property. If they may be "ignored in one case, under the plea of necessity, they "may be in all, and the railroad company may proceed to "seize upon private property and construct its road, and "leave the questions of the necessity of the taking and "the compensation to be made to be determined at its "leisure." The application was denied.

We submit that in Michigan, as elsewhere, it is the universal rule that the compensation shall be first paid before compensation is taken, and necessarily the amount of the compensation must be first *determined.* That "no court can legalize a possession" before the constitutional requirement has been fulfilled, and giving a railroad company everything it seeks by its proceedings, throw open the question of compensation for *re-fixing* and *re-determination.* That would be to say, that under the Con-

stitution the corporation seeking to take the property can go through the form of a tentative payment as a mere device to get around the constitutional provision, and then go through the farce of a new trial in the statutory proceeding to recover the money paid. It is within bounds to say that such a proposition would be grotesque, if the subject were not so grave, in thus dealing with the Bill of Rights.

It is universally held that the appropriation of the property is a waiver of any objection to the verdict, and is a confirmation by the petitioner at the respondent's election. Lewis on Eminent Domain, Sec. 531; 2 Dillon's Municipal Corporations, Sec. 614 and Sec. 609, notes.

The same principle applies to respondents and bars their appeal if they take their money after verdict. In re Woolsey, 95 N. Y., 135. The same general rule applies in chancery. 2 Daniels' Chancery Practice (5 Am. Ed.), p. 1279; Hindle vs. Bacons, Cooper's Chan. Rep. (Eng.), 378.

It must be an error of fact, not a misconception of the law, which would prevent possession, or any similar act, from constituting a waiver. Massie vs. Brady, 41 La. An., 553; Rorer on Judicial Sales, Sec. 161; Tooley vs. Gridley, 3 Snade & Marshall, 493 (515).

Moreover, it is the universal rule in all jurisprudence, that the taking payment after appeal is a waiver of the appeal by the party receiving payment, and that the corresponding taking of the *res* after appeal is a waiver of the appeal by the party seeking to possess it. See Morse, C. J., in 92 Mich., at p. 59, and cases.

II.—THEY WERE DENIED THE PROTECTION OF THAT GUARANTY OF THE STATE CONSTITUTION PROVIDING THAT THE QUESTIONS OF COMPENSATION AND OF NECESSITY SHOULD BE PASSED UPON BY ONE AND THE SAME JURY, AND OF THE SETTLED, UNIFORM AND UNREVERSED CONSTRUCTION OF THE CONSTITUTION TO THAT EFFECT BY THE STATE JUDICIARY IN RESPECT OF ALL OTHER CITIZENS.

The constitutional provision here involved, Article XVIII, Section 2, was fully considered by the Supreme Court of the State in Paul vs. Detroit, 32 Mich., 108. It was there held to be an added prohibition to a taking under Article XV, Section 15, precisely as it is held under the railroad condemnation statutes to be an added prohibition under Article XV, Section 9.

The section (Art. XVIII, Sec. 2) in question is as follows: "When private property is taken for the use or "benefit of the public, the necessity for using such prop-"erty *AND* the just compensation to be made therefor "* * * shall be ascertained by a jury of twelve free-"holders."

The Court held that a statute providing for condemnation in cities and villages, under Article XV, Section 15, was unconstitutional, because it did not provide for the concurrent finding by the jury of the necessity for the taking under the quoted section. The decision was by Campbell, Cooley and Graves, JJ. After commenting upon Article XVIII, Section 2, as not found in other constitutions, the Court says: "This question of necessity is the "one on which the right to take private property at all en-"tirely depends, and on which parties have a full right to "be heard. But this is not all. *A jury can only render "one verdict, and that can only be given when the whole*

"inquiry before them is ended. In cases like this, they "cannot determine the necessity by itself. It depends on "the other facts, as well as on the question of convenience."

That it is the constitutional right of the citizen to have both questions tried together, in accordance with the conjunctive phrasing of the constitutional provision, is again apparent from the following language of that judgment: "The owner of the property taken is entitled to receive full "compensation for any damages done him. The jury have "no right, without forswearing themselves, to give him "any less than just compensation. If the damages are "to be charged on property according to its benefits, that "property cannot be charged with more than its benefits, "and if the benefit does not equal the cost, that ends the "inquiry. It can never be legally necessary to take "property unless the result of the taking is a benefit equal "to the cost, and it can never be legal to compel an owner "to receive less than just compensation. *Until the jury "determine, not only that the improvement is desirable, "but that it is worth to the public or to the parties "chargeable all they must severally pay to fully remuner- "ate the owner, the necessity cannot be established, and "the property cannot be lawfully taken."*

The same constitutional provision is applied to the taking of private property by railroad corporations. In Mansfield Coldwater R. R. vs. Clark, 23 Mich., 519, Cooley, J., delivering the opinion of the Court, said: "The report "of the jury or commissioners must distinctly cover this "point in every case; and they cannot properly make one "which will warrant the taking of the land, unless satis- "fied not only that the particular land is needed for the "construction of the work, but also that the work itself "is one of public importance."

In Chicago R. R. vs. Sanford, 23 Mich., at p. 427: "When "the property taken is not for the state, every one is en-

"titled to have some impartial tribunal pass, both upon "the necessity of the taking, and the proper compensation "to be made for it." (Grand Rapids R. R. vs. Van Driele, 24 Mich., 409; McClary vs. Hartwell, 25 Mich., 138.)

In Grand Rapids R. R. vs. Weiden, 70 Mich., 393, Judge Campbell, delivering the opinion of the Court, said: "It "seems to be imagined that railroad companies are to be "presumed entitled to condemn lands at their own option, "and that nothing more than a formal effort is required "to give them the right to do so. But under our Consti- "tution this is not a correct view of the subject. Under "the old Constitution, when the Legislature chartered a "railroad, the right to build it became fixed, and could "not be questioned, and consequently land-owners were "obliged to acquiesce. But, under our present Constitu- "tion, there is never any presumption that a railroad is "necessary, or that any particular land ought to be given "up to it for its uses. Every land-owner, therefore, had a "perfect right to object to giving up his land, and is not "confined to objections depending upon price or value. He "may object to the lack of necessity for the road at all, or "for its location or extension over his land, at any price, "or on any conditions. In law, his use is presumptively "as important as that of a railway company, and it must "devolve on any such company to establish affirmatively "all that is needful to make out a clear case of necessity."

In Toledo R. R. vs. Dunlap, 47 Mich., 456, the Court says: "The inquiry in this State, as elsewhere, is an appraisal "or estimate of values, and not a contest on litigious "rights, *and includes what is not elsewhere included*, an "inquiry into the necessity of the proposed taking for "public purposes, which was never made by courts, but "always heretofore by the Legislature or some unjudicial "body of its creation." And see Horton vs. Grand Ha- ven, 24 Mich., 465; Arnold vs. Decatur, 29 Mich., 77; Com-

missioners vs. Moesta, 91 Mich., 149; Grand Rapids vs. Railroad, 58 Mich., 644.

The Supreme Court of the State is of course in error as a matter of fact on the record when it states, in the opinion in 92 Mich., 33, that the appeal before it was only on the question of compensation. The appeal was from the entire award, including the question of necessity (R., p. 947); and so far as this question is concerned, the opinion in that case rests upon that mistake, and not on any novel construction of constitution and statute; otherwise, even in the carelessly drawn statute, would be found not even a pretense of authority for sending back the question of compensation to be decided separately. This point was made in the trial court below as a federal question as soon as it appeared that the question of necessity was not to be submitted to the third jury and in the Supreme Court. (R., pp. 1786-1787-1659-1784.) There is nothing in any opinion of the Supreme Court in the premises conflicting with the construction of the Constitution or statutes here contended for; and nothing in the opinion in this case.

There is no precedent in the jurisprudence of the State of a separate award on the two questions.

III.—THEY WERE DENIED THE PROTECTION OF A TRIAL ON THE QUESTIONS OF NECESSITY AND COMPENSATION BY THE TRIBUNAL GUARANTEED BY THE CONSTITUTION OF THE STATE, IN ACCORDANCE WITH THE SETTLED, UNIFORM AND UNREVERSED CONSTRUCTION OF THAT CONSTITUTION IN RESPECT OF ALL OTHER CITIZENS.

Two features of the proceedings are to be discussed under this head: (1) The forcing in of Judge Gartner as the thirteenth and cont ling member of the tribunal; and (2) the sending back the record with authority to that judge to grant further new trials in his discretion.

1. Nothing can be considered settled in Michigan unless this is settled—that the provisions of our Constitution of 1851 took from all permanent official bodies, legislative and judicial, and from all official functionaries, judicial or otherwise, the power of passing upon the questions of necessity and of compensation in condemnation proceedings, and committed it as a prerogative power to a temporary body, to be organized in each case from the vicinage, of men having real property of their own; and to that body by the powers conferred upon them, was given absolute control of the inquiry, free from any *possible controlling influence or interference outside their body on the part of a judge, or any one else.*

"The proceedings, while subject to judicial review and "supervision for certain purposes, are not in themselves "judicial proceedings."

It is "a special proceeding by a temporary tribunal se- "lected for the occasion."

This Circuit Judge, as a judge, as to this tribunal possessed no judicial power, and could not be vested with judicial power.

"There are certain proceedings in court to select a jury, "and subsequent proceedings to determine whether the "action of the jury shall be sustained. Beyond this the "courts have no part in the matter."

These propositions are excerpts from the particular judgment (47 Mich., 462, supra) cited by the Supreme Court of Michigan in the opinion in the case (103 Mich., 556) from which this appeal is taken.

So that there may be no mistake as to the meaning of the decision in 47 Mich., we now quote fully from another judgment of the Court delivered by the same Justice, in which the language of the Court in that case is construed—Railroad vs. Chesebro, 74 Mich., pp. 466-470:

"The Constitution in such cases as the present allows "either commissioners appointed by a court of record or "a jury of freeholders to determine the necessity of public "use, and to ascertain the damages. Commissioners form "no part of the machinery of a court, and a jury of in-"quest is not a court. It has always been settled that the "appropriation of private property did not come under "the 'judicial power,' as it is located under the Constitu-"tion in courts, and except for the Constitution the nature "of the tribunal of condemnation would have been dis-"cretionary with the Legislature. Highway commis-"sioners act on the location of highways, and under the "old Constitution public commissioners condemn land for "State railroads. In the railroad special charters there "was no instance of action by a common-law trial jury. "Then, as under our present statutes, the jury was a jury "of inquest, specially created, and not a trial jury. "*We held in Toledo, etc., Railway Co., vs. Dunlap, 47* "*Mich., 456, where the jury was impaneled in a circuit* "*court, that the only functions of the court were to set* "*the proceedings in motion by organizing a jury or ap-*"*pointing commissioners, and affirming or vacating the*

"award; and we held, further, that the jury were judges "of law and fact, and not subject to interference by the "judge, should he undertake to accompany them. The "statute, which probably was in this respect borrowed "from some other region, while it does authorize a judge "to go with and decide questions of law and swear wit-"nesses, also allows him to deputize a circuit court com-"missioner to do the same thing. *It would be absurd to "consider such action as valid judicial action. It was* "held there, as it has been uniformly held, that the jury "cannot be made subject to any such instruction, and "must act on their own judgment."

In Chicago & Mich. R. R. vs. Sanford, 23 Mich., pp. 418-421, the constitution of the jury is discussed, and it is held that it is a "jury of inquest;" that a jury of twelve was intended, and that if any less than a jury of twelve found an award, the award would be a nullity.

In Western R. R. vs. Crane, 50 Mich., p. 188, Cooley, J. held that "the jury may conduct the enquiry without the "aid of any legal expert." (And see excerpts from judgments, p. 23 *et seq.*, this brief.)

The historic reasons for the adoption of Article XVIII., Sec. 2, are fully set out and discussed in the leading case of Paul vs. City of Detroit, 32 Mich., commencing at the bottom of page 113, and where also the independence of the jury is pointed out, even in a city case.

There has been no departure in Michigan from the rule of construction as stated in the text. See D. L. & N. R. R. vs. Probate Judge, 63 Mich., 676; Mich. Air Line R. R. vs. Barnes, 44 Mich., 222; Toledo R. R. vs. Dunlap, 47 Mich., 457; M. C. R. R. vs. Probate Judge, 48 Mich., 638; Railroad vs. Chesebro, 74 Mich., 467; Pt. Huron R. R. vs. Voorheis, 50 Mich., 510; Railroad vs. Railroad, 64 Mich., 363; Union Depot vs. Jones, 83 Mich., 415; G. R. & I. R. vs. Weiden, 70 Mich., 390; Barnes vs. Mich. Air Line R. R., 65 Mich.,

251; Crane Case, 50 Mich., 182-187; Marquette R. R. vs. Probate Judge, 53 Mich., 217; McClary vs. Hartwell, 25 Mich., 138.

Matter of Converse, 18 Mich., 459: "These appraisals "bear no resemblance to ordinary legal trials." (Campbell, J.) Pen. R. R. vs. Howard, 20 Mich., 18-25: "The "jury act in effect as judges in the absence and beyond "the control of the Court"—(Christiancy, J.). In the Dunlap case in 47 Mich., 456, there was no contention that the jury were misled, as to their own prerogative and responsibility, or were not fully conscious of their authority, or were misled as to their absolute independence of the judge who was with them, and conscious of it, and it was held in that case that the jury "will undoubtedly be "regarded as accepting and doing *what they permit to "be done*," and it is distinctly held that the function of the judge, if he attends, is purely advisory. This is the case cited in the opinion sustaining the ruling here, and we repeat that the Court below does not *assume* to antagonize, much less reverse, the uniform construction of Article XVIII., Section 2, by that Court. It ignores it.

The uniform practice under these decisions was followed in the *second* trial of this case, and when the jury desired the advice of a judge, they asked for it. In some cases on that trial they received advice from Judge Gartner, who did not attempt to preside, but sometimes sent in his views in the form of a letter (R., p. 696) and sometimes appeared and gave oral advice.

It is apparent that the constitutional provision for this inquiry aimed directly at dispensing with the judicial body composed of a court and jury as the tribunal; that it was intended that the judicial officer clothed with the dignity, the power, and the influence of a court, and so impressing the jury of inquest, should, with that impression, be eliminated; to permit the old system, then, which

was struck down by this provision of the Constitution, is to emasculate that provision, and make the poor pretense of applying it a farce.

But under it, the citizen is entitled to have the jury of inquest take the full responsibility and have the necessary conscious authority to do so pending the inquiry; and to make this radical change in method of any effect, or worth anything at all to the citizen, it is clear that the jury of inquest itself should know that the responsibility and the authority were theirs. If the responsibility and authority are conferred by the Constitution on them, the citizen is entitled to have the jury fully conscious of it and to take the duty and exercise it. But in defiance of the Constitution and of its settled construction by the courts of Michigan, the jury of inquest were relegated to the position of a common law jury, sitting under a common law judge, in authority as such, with all the powers and influence of a court, and that this was their position was impressed upon them by a person who, in respect of the hearing, was not a judge, a judicial officer, or a juror. A few references to the record will suffice to demonstrate this.

In addition to the objection to the judge sitting at all, counsel objected before the jury was called, under the specific instructions in writing of the plaintiffs in error, to Judge Gartner, on the ground that he was "prejudiced "against them, and on account of the influence which your "honor will be under consciously or unconsciously, for the "petitioner." (R., p. 981—Fol. 1692.)

In the first place, as soon as the jury was formed, he gave them a charge not to hold any conversation about the case, either among themselves, or to permit any conversation with any outsider with reference to the matter: "You must keep your minds entirely free and clear from

"any influence. You want to listen to the testimony and "the arguments of counsel as they are made in court, and "after you retire to the jury room, then, and then only, to "talk the matter over and consider the testimony offered "in the case, together with the arguments of counsel, in "arriving at a conclusion of such questions as may be pre-"sented to you." (R., p. 983.)

At page 1082 he stated to the jury: "The Court: I shall "regard this jury as a common law jury, *and shall control "them as a court, and they will have to submit to all the "orders of the court.* I do not know as I can state it any "more fairly or more concisely. I want to give you the "benefit of an exception. I know there is some question "about it, and I will say that the jury will have to conform "to the orders of this court."

Again: "The Court: I will hold this jury to the same "strict lines that I would hold any jury." Again: "Mr. "Dickinson: Let me get my record straight. I under-"stand that your honor proposes to sit here as in a trial at "common law? The Court: Yes. Mr. Dickinson: And "to rule upon testimony and to advise and instruct the "jury? The Court: Yes. Mr. Dickinson: To that I ob-"ject, and not only ask an exception, but protest against "it as a disregard of the Constitution of the State, and as "a disregard of the Supreme Court of the State—the "theory being that the jury was to get at the rights of the "question as an independent tribunal, a tribunal *sui "generis*, the best way they can, without the limitations "and restrictions of a common law trial. The Court: "Objection overruled." Again: "The Court: The jury "will only determine those questions that I will submit to "them, *and I will see that my rulings are carried out by the "jury also*, Mr. Dickinson." (R., pp. 992-1153.)

Again, substantially the same objection as above stated, by counsel for plaintiffs in error, was made at page 1152,

when, in the presence of the jury, counsel stated: "I am "asserting the theory which I propose to hold until the "end of this litigation, which I think to be the right one, "that the jury in this proceeding is a constitutional tribu- "nal *sui generis* with power to determine under the Consti- "tution." The Judge said: "That may be very true, but the "jury will only determine those questions which I will "submit to them." Again, the Judge was disposed to demonstrate to the jury that he could and might punish counsel for contempt (R., pp. 1152-1082); and so on through the record, in the presence of the jury.

At page 1137 of Record grossly incompetent testimony was admitted, and the plaintiffs in error ignored when objection was stated; and see Protests and "rulings" (R., pp. 1150, 1152, 1217, 1659, 1727). In this connection we have not referred to the disclosures in the record as to the gross impropriety of Judge Gartner sitting in the case at all. There was no good reason, even if a judge were permitted to advise, why he should be forced into the hearing rather than any one of his then four colleagues on that bench, from which he not long afterwards retired. We objected to him in the second hearing (R., p. 663), even as an adviser of the jury, if the jury desired advice. He had shown partisan feeling in this case throughout, and we point out his language on the first verdict, among other things. (R., p. 945, top.)

His unfounded imputations upon counsel on points considered essential by the Supreme Court of the State and sent up to it as to the hearing which he did not attend, are demonstrated by the record, hereinafter referred to, and we shall also call attention to page 929. Assuming to charge the jury, having permitted counsel for the railroad company to state to the jury that the Supreme Court of the State had held the amount of the former verdict to be "excessive, exorbitant and unjustified" (R., p. 1690), he

promised to remove that impression from the jury's mind in his charge, which he did not do (R., pp. 1690-1691).

On our reading three leading cases from Michigan as to what would be the due measure of just compensation, in the argument before the jury, counsel for plaintiffs in error used the following language to the Judge, after he had stated that he would charge the jury: "I call your honor's attention to this so that in "the instructions your honor contemplates giving "(the jury) they may follow, not our construction of the "decisions, but the language of the decisions of the Su- "preme Court speaking through such learned justices as "Justice Campbell and Justice Cooley" (R., pp. 1691-1692), and said (folio 2828): "I shall mark the passages and ask "your honor's attention to them in giving your views of "the law to the jury." These were the decisions in Pearsoll vs. Supervisors, 74 Mich., 558; Grand Rapids R. R. vs. Heisel, 47 Mich., 398; and Grand Rapids R. R. vs. Weiden, 70 Mich., 393 (see pp. 1692-1693-1694-1695 of Record). The judge did charge the jury in that most felicitous charge so highly thought of by the Supreme Court of the State, wherein the true principle of compensation, as stated in those cases, and counsel's requests were ignored, but he warned them against "exorbitant or grossly excessive compensation."

But the basic question here has nothing to do with the improprieties or misconduct of a judge. Far and away above such considerations is the radically fundamental objection heretofore discussed.

2. The Supreme Court sent back the case to this judge with full license to grant new trials, something that even under this statute, the Supreme Court itself could do but once, and never once, under the authorities, for objection to the amount of an award or for anything else than a

clear departure by the jury, under the constitutional conferment of power upon them from the fundamental delimitations of their functions. The statute contains no provision for the granting of new trials by a Circuit Judge, and we shall see under caption VI. *infra*, that in Michigan, as elsewhere, the proceedings to condemn private property are in derogation of the common law, and that within the statutes providing them must be found authority for every remedy, process and step in the proceedings, and that these so provided are exclusive of all others.

It would be another instance of farcical dealing with the fundamental law if it be true that "a judge can form no part of the tribunal,"—can take no part in fixing the measure of compensation,—and yet have unlimited power to grant new trials until an award shall be arrived at, which he, in his judgment, shall deem reasonable and not excessive. If the third trial were authorized at all, the plaintiffs in error, in entering upon it, were absolutely certain that any view of just compensation held by the jury, and any award they might make, could not, in the circumstances, be permanent, unless it should be according to the notion of the judge. Thus they were launched into what might be an interminable proceeding.

IV. THEY WERE DENIED THAT MEASURE OF JUST COMPENSATION FOR THEIR PROPERTY TAKEN, GUARANTEED BY THE CONSTITUTIONS, FEDERAL AND STATE, AS THE SAME WAS AND IS ACCORDED TO ALL OTHER PERSONS THAN THEMSELVES.

1. In this case, on both hearings, it was demonstrated that the lumber yard, storehouse and the factory was one and the same plant, built and established as one plant and constructed and placed one to the others, relatively, for the needs of the plant. This is the testimony, not only of the Backuses (R., 1483, 1552, 1555), but the testimony of disinterested planing mill men, and dealers with the plaintiff in error (R., 1275, 1281, 1306, 1449). There was no contradiction, or testimony the other way, on this point.

2. It was proved, without contradiction, by the Backuses, by dealers, by the artisans employed, and by planing mill men, that the business of the plant in which the profit was made, was destroyed by the railroads and their operation; (R., 1552, 1554, 1556, et seq.), and that for that reason the plant, which had been a paying business, earning a large net profit on the great volume of business, had become a failure (R., 1447, 1448, 1449, 1461, et seq.—1466, 1467, 1492-3-4). It was not disputed that the net profit had been from $25,000.00 to $70,000.00 per year, and that up to the time of the building of the structure, the profits had been $34,000.00 per year for sixteen years (R., 1524 and 1525, 1526, 1552, 1553, et seq.). The business prevented by the railroad's operation was the profitable part of the business (p. 1555, folio 2608) (p. 1556, folio 2609).

The impossibility of doing the fine work of the factory, in which the profit was, is demonstrated by the actual ex-

perience of the workmen, commencing at R., 1331, by the dealers and planing mill men (R., 1283, 1303, et seq.—1309, 1344, 1447, 1463, 1466, 1362, 1583, 1413, et seq.—1463, 1553).

Although it was held at various places in the record by the Circuit Judge that the railroad company had the burden of proof as to damages, it offered no testimony, except as to the value of the realty, the machinery in the mill, and the danger from fire, either direct or in rebuttal, and they rested their entire case upon the value of the land per foot front and the value of the fixtures, machinery and the buildings of the factory alone.

To further show the radical and fatal failure to accord a just measure of compensation in respect of the injury to the parts of the plant, other than the factory itself, and to the business, and in respect of damages to the business itself and to the whole plant from the necessary change, I call marked attention to the language of Judge Gartner, in his opinion in the record, in the case passed upon by the Supreme Court in 92 Mich., wherein it is approved (R., p. 928): "The damages awarded are most remark-"able. The right of way sought to be acquired is the right "of way for an elevated railroad along River street in "front of the property of respondents. They have a front-"age on the street of some 238 feet, and on Fort street of "about 75 feet. At $150 a foot, which is a large estimate, "the land itself is worth $46,950. The testimony of re-"spondent, Absalom Backus, Jr., is to the effect that the "buildings and improvements *had cost $150,000*, and are "worth that now. But, deducting 25 per cent for depre-"ciation, which is usual on buildings and improvements "of some years' standing, we have a valuation of $112,500, "or a total valuation for the entire property of $159,450. "And yet for simply going in front of this property a jury "makes a total award of $96,144. Comparing this award

"with what has been voluntarily accepted or awarded in "other cases on River street, we have some striking con- "trasts:

"Geo. H. Hammond, 45 feet frontage, $2,500, or $55.55 per foot.
"Diamond Match Co., 210 feet frontage, $1,600, or $76.18 per foot.
"Union Mills, 140 feet frontage, $21,250, or $157.78 per foot.
"Geo. Kunze, 25 feet frontage, $1,000, or $40 per foot.
"Geo. C Wetherbee, 25 feet frontage, $1,500, or $60 per foot.
"Hylet Barker, 25 feet frontage, $1,000, or $40 per foot.
"Frank Hildebrand, 25 feet frontage, $1,500, or $60 per foot.
"Mich. Cent., 166 feet frontage, $1,660, or $10 per foot.
"Mich. Cent., 47 feet frontage, $470, or $10 per foot.
"Barbara Steadley, 65 feet frontage, $2,615.20, or $42.30 per foot.
"Louis J. Specht, 27½ feet frontage, $1,100, or $40 per foot.
"Mary Specht, 27½ feet frontage, $1,100, or $40 per foot.
"Barbara Baxter, 23 feet frontage, $690, or $30 per foot.
"Margaret Specht, 23 feet frontage, $713, or $31 per foot.
"John Winister, 51 feet frontage, $1,530, or $30 per foot.
"Jacques Ruhlman, 20 feet frontage, $1,000, or $50 per foot.
"Rachel Ruhlman, 20 feet frontage, $1,000, or $50 per foot.
"Catherine Harpfer, 40 feet frontage, $1,600, or $40 per foot.
"Boynton & Boutell, 45.87 feet frontage, $917.40, or $20 per foot."

It will be observed that his rule of measurement is the price paid per front foot to vacant land-owners and others whose business could not be injured by the railroad, and that he assumes that the measure of value must be fixed on the value of the real estate per front foot, and upon this reasoning, he says that the first verdict was "a trav- "esty upon justice." The Supreme Court of the State comments upon this in its decision setting aside the award (see Record, p. 961): "The Court below well remarked: "'The damages awarded are most remarkable,'" and proceeds to quote Judge Gartner as above, commenting on the front foot valuation of the factory alone, and on that theory as one of the two chief reasons, the Court held that the award should be set aside. Again, in that carefully prepared charge to the jury on the third hearing, Judge

Gartner confined the jury's attention to the same considerations, to wit: "*The damages to A. Backus, Jr., as the "owner in fee of the land described,*" (*the land on which the factory stood alone*); "*and the amount to be allowed "to A. Backus, Jr., & Sons as tenants in possession of such "lands*" (*the same land on which the factory stood*).

As has been seen, we called the marked attention of the Court to the true rule of damages as laid down by the Supreme Court itself, which is the universal rule.

That is that nothing less than damage to all the parts of the plant remaining, and nothing less than full compensation for injury to the business, is just compensation, and anything less is depriving the plaintiffs in error of just compensation and is a taking of their property without Due process of law. This is apart from the question of discrimination, which was and is also made under this head.

We do not ask this Court to re-examine and weigh the evidence at all, or any errors of the jury in that matter. (Railroad vs. Chicago, 166 U. S., pp. 226-242.) But we submit under that judgment that this Court will "Inquire "whether the trial court prescribed any rule of law for "the guidance of the jury that was in absolute disregard "of the fixed right to just compensation" (Id., p. 246). The rule of law adopted by the trial court and by the Supreme Court as above quoted, and which the jury must be presumed to have taken, both under the charge, and as their knowledge of the law derived from their presumptive knowledge of the decision in this case of the Supreme Court of the State, excluded the principle of just compensation just as much as if the same influence had prevented a recovery at all.

The general rule is laid down by Cooley on Constitutional Limitations, as follows: "The statutory assess-

"ment of compensation will cover all consequential dam-"ages which the owner of the land sustains by means of "the construction of the work, except such as may result "from negligence or improper construction, and for which "an action at the common law will lie, as already stated." (Ch. XV., p. 570, Second Edition.)

The leading cases in Michigan, summing up the applications of the principle always held by the courts of that State theretofore, and affirmed subsequently, are as follows:

In Grand Rapids R. R. vs. Hiesel, 47 Mich., p. 398, it was held: "It need hardly be said that nothing can "fairly be termed compensation which does not put the "party injured in as good a condition as he would have "been if the injury had not occurred. Nothing short of "this is adequate compensation. In the case of land ac-"tually taken, it includes its value, or the amount to "which the value of the property from which it is taken "is depreciated, and in Jubb vs. Hull Dock Co., 9 Q. B., "443, it was held where the property taken was a brewery "in operation, the damages included the necessary loss in "finding another place of business. In cases where dam-"age is by injury aside from the actual taking of property, "the rule has been to make the party whole as nearly as "practicable, and where it affected the rental value or en-"joyment, the same principle has been applied as in other "cases."

This is held in that case of the rule of damages in cases open to consideration by a jury of inquest called on to assess compensation under the statute (see Id., p. 398).

Grand Rapids R. R. vs. Weiden, 70 Mich., p. 391. This was a railroad condemnation case. "Both of the appel-"lants were using their property in lucrative business, in "which the locality and its surroundings had some bear-"ing on its value. Apart from the money value of the

"property itself, they were entitled to be compensated so "as to lose nothing by the interruption of their business "and its damage by the change. A business stand is of "some value to the owner of the business, whether he "owns the fee of the land or not, and a diminution of busi- "ness facilities may lead to serious results. There may "be cases when the loss of a particular location may de- "stroy business altogether, for want of access to any "other that is suitable for it. Whatever damage is suf- "fered, must be compensated. Appellants are not legally "bound to suffer for petitioner's benefit. Petitioner can "only be authorized to oust them from their possessions "by making up to them the whole of their losses." (Camp- bell, J.)

We call attention to the opinions both of the trial and appellate courts that the factory structure cost outside the realty $150,000.00, and to the unchallenged testimony that by the change wrought by the petitioner it must move, and thus render the investment in the factory itself worthless.

In Railroad vs. Chesebro, 74 Mich., 466-474. This was a condemnation case. "An owner has a right to be in- "demnified for anything that he may have lost. The "farming test, which is the one petitioner sought to apply, "would be of no particular use in a great many cases of "suburban lands." * * * * "The mere taking of four "acres for a right of way could not be regarded, in any "sensible point of view, as compensated by one-tenth of "the value of the forty acres, taking acre for acre. The "damages in such a case must be such as to fully make "good all that results, directly or indirectly, to the injury "of the owners in the whole premises and interests af- "fected, and not merely the strip taken"—citing the Michigan cases. Further: "The jury here as in all cases "where no certain measure exists, must trust somewhat

"to their own judgment. That is one of the purposes for "which juries of inquest are provided. They are expected "to view the premises and use their own senses." * * * "But the purpose throughout is to give all the damages "which they reasonably discover, past or present, and to "result, but no more. No one can read this record with- "out seeing that the jury did not deal fully with the case. "It is manifest that they gave no damages beyond what "they assumed to be the price of four acres by the acre." * * * "It cannot be said there is any real conflict as "to the damages arising from the cutting off one part "from the other of the forty acres, and this was left out "altogether, unless they regarded the proofs of value wan- "tonly, which we cannot believe." (Campbell, J.)

Champlin, J. (Id.): "There can be no doubt that the "railroad crossing respondent's land in the manner it "does, is a serious injury to the parcel, aside from the "value of the land taken, and that the parcel on the east "side of the track is affected by reason of the fact that a "railroad must be crossed to enter upon or leave it by the "owner of the other parcel. This is an element of damages "that must necessarily enter into the award of the jury, "and the compensation therefor must be determined by "them."

In the same report (74 Mich.), in the case of Pearsall vs. Supervisors, speaking of the taking for public use, the Court says on this subject, at page 561: " 'The constitu- " 'tional provision is adopted for the protection and secur- " 'ity to the rights of the individual as against the govern- " 'ment,' and the term 'taking' should not be used in an "unreasonable or narrow sense. It should not be limited "to the absolute conversion of property and applied to "land only; but it should include cases where the value is "destroyed by the action of the government, or serious "injury is inflicted to the property itself, or exclusion of

"the owner from its enjoyment, or from any of the appur-
"tenances thereto." * * * * "If the public take any
"action which becomes necessary to subserve public use,
"and valuable rights of an individual are thereby inter-
"fered with, and damaged or destroyed, he is entitled to
"the compensation which the constitution gives therefor,
"and such damage or destruction must be regarded as a
"'taking.'"

In Port Huron vs. Voorheis, 50 Mich., 506, it is said of the citizen in such circumstances: "He was entitled not "only to compensation for the land taken, but also for "such other actual damages to his homestead as he sus-
"tained by reason of the taking, and necessarily arising "from the use to be made of the parcel taken." In that case is cited a large number of cases outside of Michigan, as well, to the point that this is the universal rule.

In Barnes vs. Michigan Air Line, 65 Mich., 251, Judge Campbell said: "The jury should consider and the land-
"owners should lay before them, all the consequences of "the appropriation of the land, and *the manner in which "the company will use it*" (citing Michigan cases). "The "same principle is familiar in many shapes."

In Commissioners vs. Railroad, 91 Mich., 291, the court (Grant, J.) after stating that when the lands of railroad companies are condemned, they are entitled to the same measure of damages as any other owners, said: "If, there-
"fore, their adjoining land is rendered less valuable by "the location of a public highway, or another railroad "across its property, there is no reason why they should "not recover compensation therefor. *Situated near this "crossing is a small tract of land used for warehouse pur-
"poses. It is insisted by the respondents that, by reason "of this crossing, this land, with the warehouse thereon, "is rendered less available and less valuable for the pur-
"poses for which it was constructed and used.* This was

"a proper element of damage, and should have been sub-
"mitted to the jury."

In Commissioners vs. Moesta, 91 Mich., 154, the Court, quoting with approval Grand Rapids R. R. vs. Weiden, 70 Mich., 295, *supra*, said: "The constitution provision en-
"titling the owner of private property, taken for public
"use, to just compensation, has uniformly been construed
"to require full and adequate compensation. The rules
"to be applied in fixing the compensation are not neces-
"sarily the same as obtain in fixing damages in actions
"upon contracts. The correct rule of compensation in
"such cases is more nearly analogous to the remedy af-
"forded in an action in tort in which property rights have
"been interfered with without the owner's assent. *In*
"*such cases damages for the interruption of the owner's*
"*business are allowed*—Allison vs. Chandler, 11 Mich.,
"549." And see directly in point on the use of a street, Riedinger vs. Railroad, 62 Mich., at pp. 44-45.

The same doctrine has been repeatedly affirmed in condemnation cases against railroads. It is the universal doctrine. Grand Rapids R. R. vs. Railroad, 58 Mich., 641-648; Toledo R. R. vs. Railroad, 62 Mich., 564; Chicago R. R. vs. Huff, 61 Mich., 507-508; Commissioners vs. Chicago R. R., 91 Mich., 291; Commissioners vs. Railroad, 90 Mich., 385. And most recently in the City of Grand Rapids vs. Bennett et al., 106 Mich., 529-537, where the rule of damages in the above cases as to railroads was again affirmed.*

The decision in 92 Mich. on this ruling complained of as being discrimination against these plaintiffs in error, was rendered on June 10, 1892. On October 27, 1892, in a judgment delivered in the case of the City of Detroit vs. Bren-

---

*The single dissent in this case is there printed first, but the judgment of the other four justices on this question is given at page 537.

nan, 93 Mich., 338, the principle applied in all the other cases heretofore cited on this question that "The full "measure of compensation and the injury done to the "business, should be allowed" was again affirmed, and the statement of it there approved was as follows: "The law "considers the rights of the property and business carried "on by the respondent as of equal consideration and en- "titled to as much protection as the right of the city to "take the property and interfere with the business; and "will not permit the property to be taken and the busi- "ness to be interfered with, unless an actual public ne- "cessity exists for the making of the improvement." * * * * "The elements of damage are: (1) The value of the "property taken for the opening of the street; the injury "to the works and property not taken, and left in the "parcel of land from which the property is taken; (2) "The injury to the business of the owner; (3) Compensa- "tion for all prospective loss or injury resulting from the "opening of the street, and the taking of the property for "that purpose." (Id., p. 341.)

V.—THEY WERE DENIED A HEARING AND DEPRIVED OF A HEARING GUARANTEED BY THE CONSTITUTIONS, FEDERAL AND STATE, AS "DUE PROCESS OF LAW," WHEN SUMMONED INTO COURT AS APPELLEES TO DEFEND THEIR PROPERTY RIGHTS AND THEMSELVES FROM IMPUTATIONS UPON THEM.

We present two features of the case under this head:

(1) The denial by the Supreme Court of the State of a hearing on the substantial and essential question, of whether counsel for plaintiffs in error abused their privilege as counsel by arguing to the jury *on the question of necessity* that the margin of the depot grounds that

belonged to the Michigan Central Road could be taken for the elevated structure; and (2) the reversal of the unanimous judgment of the Supreme Court of the State in 89 Mich., p. 209, without a re-hearing, by the judgment in 92 Mich., p. 33.

1. It appears by the record that when counsel for the plaintiffs in error began the argument on this question, they were stopped by the Court with the statement that inasmuch as the jury had found against the plaintiffs in error on the question of necessity, the Court would hear no argument from plaintiffs in error on that point,

The practice in Michigan as to the order of arguments of counsel is this: opening for the appellant, reply for the appellee, and close for appellant. No opportunity was given to answer the grave imputations of the Court below on this point, but, nevertheless, in the opinion and judgment of the appellate court, it was treated as the chief, or one of the chief grounds for the adverse disposition of the large property interests of these citizens. We raised the federal question at the first opportunity, when ordered to the re-hearing by the Supreme Court, in the trial court. We presented it again in the written motion against the entry of judgment, and directly to the Supreme Court itself in the application for the writ of certiorari; again in the assignments of error there, and in the argument in that Court on this record on certiorari. It was ignored by the State Supreme Court, with the other federal questions, and we come here at this, the first opportunity since we were denied the hearing.

At the time when this hearing was denied, the plaintiffs in error were not before the court as applicants for favor, as in the case of Allen vs. Georgia, 166 U. S., 138, and other cases of that nature discussed by this Court in Hovey vs. Elliott, 167 U. S., at pages 425 to 444. On the contrary, the plaintiffs in error were sum-

moned into the Supreme Court of the State to answer and defend their private property, and we stand upon the principle stated by this Court, in the latter case, as follows:

"In Windsor vs. McVeigh, 93 U. S., 274, the Court, "speaking through Mr. Justice Field, again said (pp. 277, "278): 'The principle stated in this terse language lies "'at the foundation of all well-ordered systems of juris-"'prudence. Wherever one is assailed in his person or "'his property there he may defend, for the liability and "'the right are inseparable. This is a principle of "'natural justice, recognized as such by the common in-"'telligence and conscience of all nations. A sentence "'of a court pronounced against a party without hearing "'him, or giving him an opportunity to be heard, is not a "'judicial determination of his rights, and is not entitled "'to respect in any other tribunal. That there must be "'notice to a party of some kind, actual or constructive, "'to a valid judgment affecting his rights, is admitted. "'Until notice is given, the Court has no jurisdiction in "'any case to proceed to judgment, whatever its authority "'may be, by the law of its organization, over the subject-"'matter. *But notice is only for the purpose of affording "'the party an opportunity of being heard upon the claim "'or the charges made. It is a summons to him to appear "'and speak, if he has anything to say, why the judgment "'sought should not be rendered. A denial to a party of "'the benefit of a notice would be in effect to deny that he "'is entitled to notice at all, and the sham and deceptive "'proceeding had better be omitted altogether. It would be "'like saying to a party, appear and you shall be heard; "'and, when he has appeared, saying, your appearance "'shall not be recognized, and you shall not be heard.* "'In the present case, the District Court not only in effect "'said this, but immediately added a decree of condemna-

"'tion, reciting that the default of all persons had been "'duly entered. It is difficult to speak of a decree thus "'rendered with moderation; it was in fact a mere "'arbitrary edict, clothed in the form of a judicial "'sentence.'

"'*This language but expresses the most elementary con-*"'*ception of the judicial function.* At common law no man "was condemned without being afforded opportunity to be "heard. Thus Coke (2 Inst., p. 46), in commenting on the "29th chapter of Magna Charta, says: 'No man shall be "'disseised, etc., unless it be by the lawful judgment; that "'is, verdict of his equals (that is, of men of his own con-"'dition) or by the law of the land (that is to speak it once "'for all), by the due course and process of law.'" * * * "In Capel vs. Childs, 2 Cromp. & Jer., 558 (1832) * * * "Lord Lyndhurst, C. B., at p. 574, said: 'A Party has "'a right to be heard for the purpose of *explaining his* "'*conduct.*'" * * * *"Can it be doubted that due pro-*"'*cess of law signifies a right to be heard in one's defense?* "If the legislative department of the government were to "enact a statute conferring the right to condemn the citi-"zen without any opportunity whatever of being heard, "would it be pretended that such an enactment would not "be violative of the Constitution? If this be true, as it "undoubtedly is, how can it be said that the judicial de-"partment, the source and fountain of justice itself, has "yet the authority to render lawful that which, if done "under express legislative sanction, would be violative of "the Constitution? If such power obtains, then the judi-"cial department of the government, sitting to uphold "and enforce the Constitution, is the only one possessing "a power to disregard it. If such authority exists, then "in consequence of their establishment, to compel obedi-"ence to law and to enforce justice, courts possess the "right to inflict the very wrongs which they were created

"to prevent. In Galpin vs. Page, 18 Wall., 350, the Court "said (p. 368): 'It is a rule as old as the law, and never "'more to be respected than now, that no one shall be "'personally bound until he has had *his day in court, by* "'*which is meant, until he has been duly cited to appear,* "'*and has been afforded an opportunity to be heard.* Judg- "'ment without such citation and opportunity wants all "the attributes of a judicial determination; it is judicial "'usurpation and oppression, and can never be upheld "'where justice is justly administered.' Again, in ex "parte Wall., 107 U. S., 265, 289, the Court quoted with "approval the observations as to 'due process of law' made "by Judge Cooley, in his Constitutional Limitations, at "page 353, where he says: 'Perhaps no definition is more "'often quoted than that given by Mr. Webster in the "'Dartmouth College case: By the law of the land is most "'clearly intended the general law; a law which *hears* "'before it *condemns*, which proceeds upon inquiry and "'renders judgment only after trial. The meaning is that "'every citizen shall hold his life, liberty, property and "'immunities under the protection of the general rules "'which govern society.'"

Moreover we still maintain, and shall submit that we here demonstrate, that the arguments of both counsel before the jury were right, and that the property of the Michigan Central in question could be taken for this structure. But even if we were wrong in that contention, we shall show that it was oppressive and unjustifiable to make the imputations upon the two counsel that have passed permanently into the law reports of the State, and to found thereon the denial of valuable rights to the plaintiffs in error. We shall show by the record that the most serious stricture in that opinion has nothing what-

ever to rest upon except a clear perversion of the statements of counsel by Judge Gartner, which we were about to show when stopped in the argument.

On the question of the abuse of counsel's privilege before the jury, the Supreme Court of the State, in the case of Prentis vs. Bates, 93 Mich., 236, said: "The first ques-"tion considered was whether counsel for the contestants "abused his privilege in his opening statement to the "jury. On the former hearing the sitting members of the "Court were impressed with the view that the trial judge "had not sufficiently restricted contestants' counsel in "this case, but a fuller argument and examination have "convinced us that the statements of counsel, both as to "the propositions of law contended for in his opening, and "as to the facts which he expected to prove, were made "in the utmost faith." * * * "It is unnecessary to "determine whether the contestants' position on the law "of the case was wholly sound or not, as counsel has the "right under the rulings of the Court, to state in good "faith his claims as to the law, in so far as it was neces-"sary to give the jury an understanding of his theory. As "was said in Fosdick vs. Van Arsdale, 74 Mich., at page "305: 'Counsel have the right both in opening the case "'to the jury, before the testimony to support their case "'is offered, and when closing the argument after the "'testimony is in, to state to the jury that they claim the "'law thus and so.'"

So that the ground for reversal in the present case is this, that, notwithstanding the jury found against us on the question argued, yet in some way not clear, the argument increased the damages, and, most grave and important of all, was made in *bad faith.*

Now, it appeared by the record, on the testimony of the railroad company's own witnesses, that the Michigan Central Depot grounds in question, in the center of the city,

extended between Third and Twelfth streets, along and fronting on River street the entire distance between those streets, with a depth to the river, comprising forty acres: and what was called the "old depot grounds" extended below Twelfth street, comprising forty acres. (R., pp. 128, 151, 159.) That in addition, within the city, and three miles from these grounds, the Michigan Central had a mile square of territory for yard purposes. (R., p. 265, Fol. 455.) It is testified by the railroad company's witness Mulliken, who was superintendent of the Detroit, Lansing & Northern, which used the Michigan Central grounds, that the best and most direct route for the petitioner's road was along the margin of the Michigan Central grounds. (R., p. 257.) And that if the elevated structure should run along the margin of the Michigan Central holdings and the Michigan Central desired to put a track for business in there, the business could as well be done under the proposed elevated structure as without it. (R., p. 260.) The projector of both union depots—Mr. Joy—testified that that would be the most direct route for the union depot approach. (R., pp. 145-152.) It appeared by the testimony of the Michigan Central superintendent that in the forty acres, the Michigan Central Road had two great elevators. (R., p. 265.) It further appeared by the testimony of the depot company's engineer, Ellis, that under his elevated structure, the ordinary railroad trains could pass without interference in "the slightest degree," (R., p. 64. Fol. 112.) To the same effect, Mr. Joy (R., p. 170, top.) It also appeared that formerly in these Michigan Central grounds the Great Western Road and the Grand Trunk used them and had since retired from the use of them. Further, that the roads now engaged in this union depot enterprise, including the Flint & Pere Marquette and the Detroit, Lansing & Northern, were still using the Michigan Central grounds, but were about to

retire on the completion of this particular union depot, and that the Michigan Central had added to its ground the former holding of the Detroit, Lansing & Northern (p. 180—Folio 312, p. 260, Folio 447).

There was not a particle of evidence that there were any tracks of the Michigan Central along the proposed margin on River street, but that there were along there old buildings and sheds.

The provision for the Michigan Central Company's "track and rights of way" in its charter is that the total width for such purposes is limited to "150 feet through "the entire line thereof." Section 5, (299) Railroad Laws of Michigan, 1890, p. 117.

With these conditions, we have the provision of the Union Depot Act as follows:

"§ 3463.—Sec. 6. In case any such company is unable "to agree for the purchase of any real estate, property or "franchises required for the purpose of its incorporation, "it shall have the right to acquire the title to the same "in the manner and by the special proceeding prescribed "in this act; but there shall be no power, except for cross-"ing, to take *the track or rights of way* of any other rail-"road company without the consent of said railroad com-"pany."

The depot grounds were certainly not "the track or right of way." This is a clear implication that any other property which is not "Track or rights of way" of a railroad company may be taken.

Aside from that question, the Union Depot Company approach was made an elevated structure from the time it entered River street at Twelfth street until it came down to grade again to pass into the Union Depot itself for the purpose of *crossing* or going over the mass of tracks of the Michigan Central Railroad on River street. (This theory was presented to the jury, R., p. 800, f. 1375.)

Now, it may be said generally that "In our country, it "is believed that the power" (to take property for public use) "was never, or at any rate, rarely questioned, until "the opinion seems to have obtained that the right of "property in a chartered corporation was more sacred "and intangible than the same right could possibly be in "the person of a citizen; an opinion which must be with- "out any grounds to rest upon until it can be demon- "strated, either that the ideal creature is more than a per- "son, or the corporeal being is less; for, as a question of "the power to appropriate to public uses the property of "private persons resting upon the ordinary foundations "of private right, there would seem to be room neither for "doubt or difficulty." West Bridge River Company vs. Dix et al., 6 How., at page 533.

In 124 Mass., p. 370, Boston R. R. vs. Lowell R. R., the general rule against such taking is stated as strongly as it is held anywhere by Chief Justice Gray, as follows: "The general principle is well settled and has been applied "in a great variety of cases, that land already legally ap- "propriated to a public use, is not to be afterwards taken "for a like use, *unless the intention of the Legislature that it "should be so taken has been manifested in express terms, or by "necessary implication.*"

But in Michigan the basic principle of that opinion does not obtain. The uniform holding of the court of last resort in that State is that the business of a railroad company is private business, and that the taking of private property for its uses is an exceptional application of the power of eminent domain, made necessary, it is true, by changed conditions, but that the theory that the taking is for public use is a fiction.

See People vs. Salem, 20 Mich., 496, and the several opinions of Cooley, Campbell and Christiancy, JJ. In Grand Rapids R. R. vs. Railroad, 35 Mich., pp. 264, 273, it is

said that the "theory that land taken under the power of "eminent domain is taken for public use, has really caused "much mischief." * * * "Corporations have fre- "quently, in order to accomplish their purposes, sought to "give this term its broadest meaning, and then using it as "a foundation to erect structures thereon, wholly at vari- "ance with all well-known legal principles. In this they "have derived encouragement and support from the "courts in holding that property thus taken and held by "a private corporation is taken for a public purpose, in "order to find some ground upon which to authorize its "being taken *in invitum*."

The conclusion reached in that case was: "Our conclu- "sion upon this branch of the case is that the franchises or "property of one railroad may be taken for the construc- "tion of another, *in all cases where the property of an indi- "vidual might be, upon making compensation therefor*." And see Toledo R. R. vs. East Saginaw R. R., 72 Mich., 206.

(In these citations we will also cover the point that the question of "necessity" involves not only the public need, but also the necessity of the particular route selected by the condemning corporation.)

In Grand Rapids R. R. vs. Weiden, 70 Mich., 393, it was said: "It seems to be imagined that railroad companies "are to be presumed entitled to proceed to condemn lands "at their own option, and that nothing more than a for- "mal effort is required to give them the right to do so. "But under our constitution this is not a correct view of "the subject. Under the old constitution, when the Leg- "islature chartered a railroad the right to build it became "fixed, and could not be questioned, and, consequently, "land-owners were obliged to acquiesce. But, under our "present constitution, there is never any presumption "that a railroad is necessary, *or that any particular land "ought to be given up to its uses*. Every land-owner, there-

"fore, has a *perfect right to object to giving up his land, and "is not confined to objections depending upon price or value. "He may object to the lack of necessity for the road at all, or for "its location, or extension over his land, at any price or on any "conditions. In law, his use is presumptively as important as "that of a railway company, and it must devolve on any such "company to establish affirmatively all that is needful to make "out a clear case of necessity.* And a road already estab- "lished has no better claim than any other to extend or "change its lines. Although railroads are allowed by "public policy to condemn land, because they cannot exist "otherwise, nevertheless the enterprise is, under our laws, "which prohibit public ownership of railways, one of *pri- "vate interest and emolument*, and must show its claims to "legal assistance."

And see general discussion by Judges Cooley and Campbell on this power, in Ryerson vs. Brown, 35 Mich., 332. This language is used by Judge Cooley: "It is always an "invasion of liberty and of right when one is compelled to "part with his possessions on grounds which are only "colorable. A person may be very unreasonable in in- "sisting on retaining his lands, but half the value of free "institutions consists in the fact that they protect every "man in doing what he shall choose, without the liability "to be called to account for his reasons or motives, so long "as he is doing only that which he has a right to do."

(And see Powers' Appeal, 29 Mich., at p. 509; People vs. Brighton, 20 Mich., 57, *certiorari*.)

In Grand Rapids vs. Railroad, 58 Mich, 646, Judge Campbell said: "It has often happened that juries have "been led or allowed to evade their own responsibility in "passing on the necessity for the work itself. That is, as "we have frequently pointed out, their most essential "duty, because, *if it is taken for granted the road is to be laid "out, the position of the particular parcels on the line is fixed*

"when the road is fixed. The object of the Constitution is to "prevent all needless appropriations of private property, "which are too often made for ends in which the public "are in no strait, and for private fancy or emolument "rather than the general welfare."

We submit with confidence that there can be no doubt (irrespective of the general railroad statute, Paragraph 3357, quoted at page 34 *supra*) that under the last cited section, the grounds of the Michigan Central Road could be taken for public use and can be taken by another railroad company upon paying compensation.

Grand Rapids R. R. vs. Railroad, 58 Mich., 641; Toledo R. R. vs. R. R., 62 Mich., 564; Chicago R. R. vs. R. R., 61 Mich., 507-8; Commissioners vs. R. R., 91 Mich., 291; Commissioners vs. Rd., 90 Mich., 385; Grand Rapids vs. Bennett, 106 Mich., 528.

In a case decided since 92 Mich., 33, and 103 Mich., here in question, the Supreme Court of the State—in the case of Cinn. R. R. vs. Bay C. R. R., 106 Mich., at page 473, which was very fully and elaborately argued by able counsel, held: "Section 3331, 3 How. Stat. subjects railroad prop- "erty to condemnation excepting (under some circum- "stances) the track and right of way. The argument is "made that this is an attempt to condemn the track and "right of way, and if this appeared from the petition and "answer, it might be necessary to try it again. But it "does not, and we think the Circuit Judge was right in "declining to allow the question to be raised."

Now, Section 3331 is in the words of the union depot section last above quoted, so far as this matter is concerned. An amendment (1882) has been added giving some *further power* as to tracks and rights of way in case the track and right of way has not been finished or used for five years, but the amendment does not change the part here construed. § 3350 Howell—cited as having

some bearing in 92 Mich. at page 50—has no bearing, but if it had it clearly provides for a taking by the usual condemnation proceedings.

Finally and conclusively, it appears by this record that the Michigan Central Railroad owned the "front on River street" from Third to Twelfth street for the depot grounds in question. It has been shown that its ownership extended to the center of the street, and the most valuable property right in "depot grounds" in Detroit was its front and property interest in the street as a part of those grounds on that front.

The Michigan Central, as shown by Mr. Joy, was hostile to this petitioner's enterprise, and fought it. (R., p. 152, Fol. 262, and elsewhere in the record.)

But the first case commenced for condemnation was this depot property of the Michigan Central on River street (R., p. 148). As to the contest, Mr. Joy states as follows: (R., p. 154). Q. "When you came to condemn, "although the Backus was the first trial except the Mich- "igan Central, when you came to condemn the rights of "the Michigan Central on River street, you must come up "from the Union Depot to your passenger depot; when "you elected to condemn the rights of the Michigan Cen- "tral and came along River street, the Michigan Central "did not urge the question of necessity very much, did "they? Mr. Joy: *They argued the case in every possible form.* "They brought up the question of necessity; it was before "commissioners, and Mr. Pond and Mr. Russell raised the "question of necessity, and assumed that they were going "to win on that question."

Now, at page 303, Folio 520, to page 305, Folio 525, *appears the proceedings and findings* of the commissioners in that hotly contested proceeding, appointed under this very statute to condemn this Michigan Central depot

ground front. As the result they *did* condemn: (1) The triangular piece of land belonging to the Michigan Central on River and Twelfth street, a part of these grounds. (2) They condemned the front from the east line of Twelfth to the westerly end of the passage-way for teams along this elevated structure. (3) They condemned 1,500 feet in length above the crossing of the Michigan Central tracks toward Third street. (4) They condemned the front of the Michigan Central Company to their flour shed and freight houses on the north side of River street, 166 feet. And so they condemned the depot property of the Michigan Central Rail road for this enterprise from the place of entering River street at Twelfth street throughout the occupation of River street by these defendants in error.

In view of this testimony, and of the law, we submit that we were right in arguing that there was no necessity for this road to pass up River street against the Backus property; that whether we are wrong or right, the counsel were absolutely entitled to a hearing on the good faith of the argument, before bad faith could be found by the Court, and that the denial of that hearing was a gross violation of a fundamental right of these citizens and of the counsel as their representatives.

As further evidence of good faith, while we at all times denied the right of a judge to constrain or control the jury, we repeatedly suggested to the jury that it call in any of the other circuit judges than Judge Gartner for advice upon the law. R., pp. 669-670, and so on throughout the case.

Without, in the printed argument, pursuing at length the instances of misrepresentation of the counsel for plaintiffs in error, we take one as illustrative and typical, which the Supreme Court discussed chiefly in disposing of

the case without permitting us to be heard upon the subject.

To premise, the civil engineer, Ellis, in charge of the construction for petitioner, under examination of petitioner's counsel had sworn to the advice he had received, that as a matter of law the petitioner had no right to go on the margin of the Michigan Central property (R., p. 48, Fol. 84).

Mr. James F. Joy, called for petitioner, was examined and sworn as to his opinion of the law, as a lawyer, at great length at p. 112 of Record, Fol. 195; p. 113, Fol. 196; p. 188, folio 290; p. 616, folio 1054; p. 623, ff. 1065, 1066, et seq. He was asked such questions as this: "Q. You "say you were a member of the bar for a number of years, "and the attorney and president of the Michigan Central "Company, and connected with all these different enter- "prises, and you say you know of no law to condemn the "right of way across that property?"

After such testimony as to the law of the case, when *petitioner's* witness, Superintendent Mulliken, was on the stand, the counsel for plaintiffs in error *in the cross-examination* discovered that Honorable George V. N. Lothrop had given advice on the subject, and ventured to call it out. Mr. Lothrop was subsequently called by petitioners, and testified (R., p. 634) that he had no recollection of any such conversation with Mr. Mulliken as testified to by the latter, or, as he put it: "As I have no recollection of the "question ever having arisen, of course I have no recollec- "tion of ever having given any advice to anybody on the "subject."

It turned out that he was not familiar with the Act of 1881 at all, and his conclusion was, as stated, that if there was a general railroad law authorizing it, he did not see any objection to such condemnation, "*so that it will op- "erate within the rule that would govern the taking of pri-*

"vate property for public purposes." (R., p. 637.) On the general question he says: "Before I should dare to an-"swer a question of that kind (as to what might be done "under the Act of 1881) I should give the matter of juris-"diction of the tribunal a very quite careful examination, "which I never did." (R., p. 638.) And in reply to petitioner's counsel, Fol. 1091, said that he had been long out of practice, and so on at page 639 of Record.

Now, the following was the actual comment made before the jury by counsel for plaintiffs in error on Mr. Lothrop's testimony, in respect of the course of the petitioners in calling him as a witness. R., p. 816, folio 1403:

"There was nothing improper about putting Mr. Lo-"throp on, inasmuch as Mr. Mulliken had testified as to "what he was advised by legal counsel. I did not criti-"cise the action of the gentleman in putting Mr. Lothrop "on. The testimony of Mr. Lothrop was that he was not "aware of any statute at that time. There was no statute "at that time, and so far as my having criticised Mr. Lo-"throp, I said, railroad lawyer that he was, and counsel "for the Michigan Central, and counsel for the Detroit, "Lansing & Northern, nothing could make him say that "that property could not be taken under the statute. I "waived the oath of Mr Lothrop, and I think he would "tell you that the counsel who now addresses you, who "followed him when there were few to follow him, in the "old days, who had followed him wherever his white "plume shone, etc., would be the last man to reflect in the "slightest degree upon G. V. N. Lothrop."

Judge Gartner pretends to review this whole matter in his return to the Supreme Court. He omits all reference to the testimony as to the law put in by the petitioners. Without referring to the context, he then brings out strongly the testimony of Mulliken as if called out without excuse by counsel for respondent. He recites the

calling of Mr. Lothrop to show that he does not recollect the advice testified to by Mulliken; he omits all reference to counsel's actual comment on Mr. Lothrop's testimony. He omits the immediately preceding context showing that what he quotes is an immediate reply, and does not refer to Mr. Lothrop's testimony in that connection at all. And thus he falsely represents to the Court that respondent's counsel, with intent to mislead the jury, attack petitioner's counsel for introducing Mr. Lothrop, and Mr. Lothrop himself for taking the stand in reply to Mulliken on that law.

Judge Gartner says, in that statement which is so carefully reviewed and followed in the opinion of the Supreme Court:

"*After the testimony of Mr. G. V. N. Lothrop had been intro-*
"*duced, the attorney for the respondents made the following ar-*
"*gument or statement to and before said jury relative to the tes-*
"*timony of said witness:* For the first time in a somewhat
"long professional career, although a young man, counsel
"have seen fit to call upon the witness-stand lawyers to
"testify what the law is. Nothing was ever heard of it
"the time before, and for the first time in a long profes-
"sional career we have been charged, or I have been
"charged, with not doing my duty, because I would not do
"such an unprofessional thing as to call a lawyer to testify
"as to the law. Now, gentlemen of the jury, will sound
"make you believe or disbelieve the evidence of your own
"ears and the testimony of Mr. Lothrop? Did Mr. Lothrop
"tell you, or would he tell you, or could he be brought to
"tell you—counsel of the Detroit, Lansing & Northern,
"formerly counsel for the Michigan Central, a railroad
"lawyer from the crown of his head to the sole of his feet,
"could he be brought to tell you that you could not con-
"demn that margin of the Michigan Central under that
"statute?" (R., p. 909.)

Now, that language was imported by the Circuit Judge from the following place, where it was a direct reply to counsel for petitioners on the same page (made immediately), where counsel for the petitioner had stated, *in reference to the testimony of Mr. James F. Joy* (not Mr. Lothrop), "The leader of the Michigan bar for at least 25 "years," and of respondent's failure to call lawyers as witnesses in reply to Mr. Joy's sworn views of the law:

Mr. Baker: "I have already presented to you the best "possible evidence, the gentleman who was the leader of "the Michigan bar for at least 25 years, and he sustains "every proposition that I have made in regard to the law "of this case; there is no doubt about it. They have rested "their case. *Where is there a member of the bar in this city "that has come here to testify that we have any such power?* "I have proven it by James F. Joy, a man who was in the "active practice of law in this city for years, before he "went to railroading, who was the legal adviser and the "president of the Michigan Central Railroad for years. "He tells you he never heard of any such power or any "such statute, for it does not exist." (R., p. 667), and so on (without mentioning Mr. Lothrop).

Immediately the counsel for respondents replied to that statement, and to that statement only, with the language quoted by the trial judge: (R., p. 667, Fol. 1138-9-40).

We submit these extracts from the record without characterizing the use made of them or its motive.

2. The decision in 89 Mich., p. 209, was *res judicata.*

There can be no change in the decision of a court in a case between the same parties, unless the court itself desires a re-argument and orders it. See 2 Jacob & Chaney's Mich. Digest, p. 12, 3 Id., p. 505.

The rule of law as laid down by the Supreme Court in the decision of a cause is to be applied upon the same

state of facts in all the subsequent proceedings in the cause. Mynning vs. Detroit R. R., 67 Mich., 677. And a change in the composition of the court will not warrant a re-opening of the controversy, unless the court itself orders a re-argument. (McCutcheon vs. Homer, 43 M., 483.) An adjudication is conclusive in respect to (1) the subject-matter of the litigation, and (2) the point of fact or law, or both, necessarily settled in determining the issue on the subject-matter. Jacobson vs. Miller, 41 Mich., 90.

The distinction is clear between the decision in the same proceeding and a judgment in a different suit, though between the same parties, involving other facts.

In Hickox vs. Railway Company, 94 Mich., 237, the Court said, after quoting Judge Cooley, in Motz vs. City of Detroit (18 Mich., 522):

"It is a well-settled rule that courts will not review for-
"mer decisions made by the same court in the same cause,
"and on the same facts. Wells, Res. Adj., Sec. 613; Stacy
"vs. Railroad Co., 32 Vt., 552; Washington Bridge Co. vs.
"Stewart, 3 How., 425, and authorities there cited."

In Damon vs. DeBar, 94 Mich., 594, in reviewing a prior decision under such circumstances, the Court said: "It is "insisted that the Court was misled upon the former hear-
"ing as to the points in dispute, and counsel for defend-
"ants close their brief with the following:

" 'We respectfully insist that the charge of the Court
" 'on the other trial was correct.'

"If counsel entertained the impression that the Court "was misled upon the former hearing, it was their duty, "both to their client and this Court, to ask for a rehearing. "*It is well settled that a rule of law, as laid down by this Court "in the decision of a cause, is to be applied upon the same state "of facts, in all subsequent proceedings in that cause.* New-
"berry vs. Trowbridge, 13 Mich., 278; Mynning vs. Rail-
"road Co., 67 Mich., 677."

A notably hard case of the application of the doctrine of *res judicata* is related by Judge Cooley in his opinion in Jacobson vs. Miller, 41 Mich., 90.

The case in 89 Mich., 209, was an intermediate mandamus proceeding in this condemnation suit, and as to such proceedings, which are always conducted by the parties to the original litigation, the adjudication of the Court in them is binding upon them in all future proceedings in the matter. The law of *res judicata*, as we have stated it, applies to such a case, and it is so held in Michigan.

In Weed vs. Mirick, 62 Mich., 414, a mortgagee of personal property was garnished; whereupon, upon the petition of the plaintiffs, alleging that the mortgagee had advertised the goods for sale, *and denying the validity of the mortgage*, and asking for the delivery of the property to a receiver to be appointed by the Court, an order was made by the Circuit Court appointing such receiver and for the transfer of the goods to him, and staying the mortgage sale; application to set aside the order was made to the Supreme Court by mandamus to set aside the order by the garnishee. The validity of the mortgage was involved in the mandamus proceeding. Afterwards, upon the trial of the issue in assumpsit, the Circuit Judge directed a verdict for the plaintiff, and the case again went to the Supreme Court by writ of error. The Court said, at page 419: "The counsel for the defendants insisted all through "the trial in the court below, and argue here, that the "validity and good faith of this mortgage was decided in "this court, orally, upon the mandamus proceedings, and "that such is the evident purport of the peremptory writ "as issued; that such decision is *res judicata*, and that the "garnishee proceedings should have been quashed." Held, that the decision in the mandamus case in the Supreme

Court was *res judicata* in the subsequent proceedings in the original case in that court on error.

It should be stated that on the return in the mandamus proceeding decided in 89 Mich., 209, every authority was presented that was presented later, or which is considered by the Supreme Court in 92 Mich. The decision of Judge Gartner granting a new trial and embracing in this record from page 878 to page 929, covering the same matter precisely reviewed and passed upon in 92 Mich., 33, was sent up as the return to the mandamus.

VI. FINALLY, HAVING BEEN DEPRIVED OF THEIR PROPERTY SOUGHT BY THE RAILROAD COMPANY FOR ITS PURPOSES, THEIR PERSONAL ASSETS OF THE VALUE OF ONE HUNDRED AND TEN THOUSAND ($110,000.00) DOLLARS, WERE TAKEN FROM THEM UNDER THE COLOR OF A JUDGMENT AND PROCESS UNKNOWN TO THE CONSTITUTION AND STATUTES OF MICHIGAN, AND UNKNOWN TO JURISPRUDENCE, WHEREBY THEY WERE DEPRIVED OF THEIR PROPERTY WITHOUT "DUE PROCESS OF LAW."

We will consider: 1. The judgment, and 2. The execution.

1. We have shown at page 41 (*et seq. supra*) that where possession has been taken and the owner of the private property has accepted payment, there can be no valid appeal at all. We have shown that in any case, whether the condemning corporation has taken possession or not, but where the property owner has accepted the amount of the award, the only possibility of a valid appeal is one in behalf of the property owner, and who, if he does so appeal, thereby waives his constitutional right to consider the matter a finality, and his legal right to the money received. We have seen, too, that if there were any statute in contravention of these propositions, the statute would be unconstitutional and void.

But there is no such statute. Involved, in many respects meaningless, inartificially and carelessly drawn as it is, (See authorities, p. 29 *et seq. supra*), it does *not* provide, in case of an appeal by a party other than the private property owner who has so received his money, that a judgment may be rendered against him for any difference in favor of the railroad company, between a first and second awards. The only provision for judgment, in paragraph 3468, Sec. 11, is in terms for judgment against "*the party so appealing.*" Not only is this so in terms, but the adverse reading cannot be put upon it, even literally, save by act of the legislature. The subsequent sentences of this confused section show that the legislature which enacted this provision was dealing with an appeal by the property owner who had received his money; the legislative mind inserted the following sentence in an effort to preserve the status quo pending the appeal, among others: "*And when the same*" *(the appeal)* "*is made by others than the company, it shall not be heard except on a stipulation of the party appealing, not to disturb such possession during the pendency of such proceeding.*" No other construction can be put upon it than here contended for, except by holding that the words, "against the party so appealing," was a clerical error. And to hold that it is a clerical error is to force a construction, as we have seen, in violation of the fundamental law. The plaintiffs in error were *not* the "party so appealing."

But moreover, it is to be observed, there is no provision in the act as to the court in which judgment may be rendered. These proceedings, as shown, can be taken with equal validity and effect in the Probate Courts, and it is held of that court in direct connection with the condemnation statute, that they have no common law powers, and that such powers cannot be conferred by statute in aid of

the jurisdiction. They cannot enter a judgment even in proceedings within their original and peculiar jurisdiction except by statute. The Probate Court cannot enter a judgment, or exercise any common law powers, and such powers cannot be conferred upon them. See D., L. & N. R. R. vs. Probate Judge, 63 Mich., pp. 676, 680; Holbrook vs. Cook, 5 Mich., 228, and as to nature of Probate Courts; Ferris vs. Higley, 20 Wall., 375.

And further as to such statutory proceedings see authorities *infra*.

2. The Execution.

There is no provision in the statute for the issuing of an execution. It had been supposed, prior to the case at bar, that as to statutory proceedings and under statutes in derogation of the common law, the effect of which are to divest a citizen's real property, a grant of power under them did not carry with it all the usual and necessary means for the exercise of the power, and that there could be no implication of authority to piece out such statutes if ineffective; that other statutes or laws could not be invoked in aid of defects in the statutory processes, and for inefficiency the only resort must be to legislation.

Sibley vs. Smith, 2 Mich., 487. Citing 10 Pet., 161; 18 Johnson, 418; 2 Cowan, 199, 233-5; 2 Dal., 216; 4 Hill, 99.

But the majority opinion of the Supreme Court in this case delivered by Mr. Justice Long, in 103 Mich., 556, finds the authority for the execution in this case in Howell's Compilation, § 7664, Sec. 4, as follows: "Whenever "judgment shall have been or may hereafter be rendered "*in any court of record*, execution to collect the same may be "issued to the sheriff, or other proper officer of any county "in this State, and successive or *alias* executions may be "issued one after another upon the return of any execution

"unsatisfied in whole or in part for the amount re-"maining unpaid upon any such judgment." That is in the chapter entitled "Judgments and Executions," following the chapters covering, with this one, proceedings in courts of record at common law: "The Commencement of Suits," "Pleadings," "Evidence," "Trial of Issues of Fact," "Qualifications of Jurors," "Amending Pleadings and Proceedings" and "Assessment of Damages" in common law suits. That statute was adopted in 1849, and was and is the only general statute providing for the issuing of an execution in ordinary suits at common law. It is construed by the Supreme Court of the State as applying to no other judgment except judgments in such suits. In Michigan the action of replevin is strictly statutory. In Rathbone vs. Ranney (14 Mich., 382) the court—Cooley, Campbell, Christiancy and Marston, JJ.—construed this statute in a replevin suit and said:

"This statute does not apply to a writ of return, and "embraces only the *ordinary* executions upon money judg-"ments which are to be collected by execution. It is "claimed, however, that it extends by analogy to all kinds "of executions upon all judgments. *The statute of re-"plevin gives no such directions*, and we are remitted to "the old law to ascertain whether the various writs come "under the necessary connection." * * * *

"The analogies, then, are not such as to indicate the "propriety of extending the operation of the statute on "executions beyond its fair intent as expressed by its "language." It was held that the writ running to another county was invalid.

It was contended there that this general statute might apply to a case of judgment in replevin, and Mr. Lothrop, for the contention, showed that the writ of execution in replevin (*retorno habendo*) was a common law writ, and a true execution.

Now the Union Depot Act was enacted in 1881. In Dibell vs. The People, 22 Mich., 370, the *general* Justices' Act entitled "Of Courts held by Justices of the Peace," came up for consideration in connection with the claim that a justice could exercise certain powers under that act to piece out the exercise of power under a special act conferring jurisdiction in certain cases upon justices in the nature of forcible entry and detainer. The Court reviews the two statutes, and comments upon the fact that the general justice act was passed in 1855, and the fact that the special jurisdiction in entry and detainer was conferred in 1861; and the Court proceeds to hold: That whenever a justice of the peace proceeds to try one of these special proceedings "He derives all his "power to do so from—and must in all respects be gov- "erned by—Chapter 150 (act conferring jurisdiction in "forcible entry and detainer proceedings) and the acts "amendatory thereof, and that he cannot invoke, nor is "he bound by any of the provisions of Chapter 117 (Gen- "eral Justice Act) except so far as Chapter 150 or its "amendments may have adopted certain proceedings of "the former as substantially a part of the latter."

But by the universal holding in Michigan, as elsewhere, it is a general rule of jurisprudence, the violation of which is a departure from due process of law (Mo. Pac. R. R. Co. vs. Humes, 115 U. S., 520), that when proceedings are statutory, and in derogation of the common law, within the statute, which must be strictly pursued, must be found authority for every process; and if that statute fails to provide any proceedings essential to execute its purpose, the statute must be held to be ineffective for want of that essential. Nothing can be imported into it to help it out from other statutory and common law remedies. The remedies provided are exclusive.

A direction for execution is of course no part of a judgment. *Freeman on Judgments*, 4—Kramer vs. Redman, 9 Iowa, 114.

In no case under statutory proceedings where provision is made for judgment to be entered is an execution issued without a special provision for it in the statute itself, and in every case in Michigan there is in the statute authorizing judgment a special provision expressly authorizing an execution thereon. Judgments in attachment cases, §§ 8007, 8021. In garnishment and other cases, 8062, 8066, 8073, 8076, 8077, 8079, 8080, 8090, 8092, 8093, 8095, 8098; for costs and proceedings to recover possession of lands before Circuit Court Commissioners and courts of record, 8293, 8294, 8309; upon judgment for defendants in water craft cases, 8281; for costs in favor of defendant in suits on official bonds, 8226; on judgments in replevin, 8344, 8345; on judgments to enforce liens upon personal property, 8405; on judgments on recognizances, 8458; for collection of fines and costs in certain cases, in justices' and circuit courts, 8471, 8472; on judgments entered up upon awards of arbitrators, 8489; on judgments for costs for defendants in mandamus cases, 8677; to enforce decrees in chancery, 6653.

And so on wherever a judgment is provided by statute in every case.

Judge Cooley (Constitutional Limitations, 6th edition, p. 651, says of statutes permitting the condemnation of private property: "The powers granted by such statutes "are not to be enlarged by intendment, especially where "they are being exercised by a corporation by way of "appropriation of lands, or for its corporate pur-"poses. There is no rule more familiar or better settled "than this, that grants of corporate power being in dero-"gation of common right, are to be strictly construed; and "this is especially the case where the power claimed is a

"delegation of the right of eminent domain, one of the "highest powers of sovereignty pertaining to the State "itself and interfering most seriously and often most "vexatiously with the ordinary rights of property."

Said the Supreme Court of the State in Specht vs. Detroit, 20 Mich., 168: "In proceedings to take private prop- "erty for public use, there can be no substantial departure "from the fundamental requirements of the statute with- "out violating the whole procedure."

In Pearsall vs. Supervisors, 71 Mich., 438, the Court said of the exercise of this power in the taking of private property: "When the exercise of authority is limited by "statute, and its exercise affects private rights of indi- "viduals or divests them of property or valuable rights, "the record of the proceedings must show that the act by "which this is done is within the limits of the power con- "ferred."

In Derby vs. Gage, 60 Mich., 4, it is said of such proceedings, "These proceedings are purely statutory, and "the remedies therein provided are exclusive, and cannot "be extended beyond those contained in the act."

In the matter of Convers, 18 Mich., 459, it was contended that in condemnation proceedings, inasmuch as the Constitution provided for a jury, that the right of peremptory challenge could be imported from the general practice in suits at common law. The courts say on that subject: "The only provision under our law allowing "peremptory challenges in matters not criminal is found "in the chapter of the Comp. L. relating to the trial of "issues of fact and allows a challenge of two jurors in "civil cases, as well as in prosecutions. This does not ap- "ply to special proceedings, not in the ordinary course of "law, and which are regulated entirely by proper statute."

In Railroad vs. Campau, 83 Mich., 31, in a condemnation proceeding, it was attempted to apply the practice of the

common law courts in Michigan by propounding special questions to the jury, and requiring them to answer them. The jury failed to answer the questions, and error was assigned on appeal. The Court says: "There is no pro-"vision in the statute relative to condemnation proceed-"ings authorizing the submission of special questions." Held not error.

In 83 Mich., 513, in re George T. Smith Co., the Court said: "Upon statutes creating a liability where no con-"tract relations existed, and where no liability existed "before, or independent of the statute, a strict construc-"tion must be placed upon the statute, because, although "remedial they are in derogation of the common law, and "impose liabilities where none existed before."

In Weimer vs. Bunbury, 30 Mich., 201, it is said, "Where "the proceeding is in derogation of common law prin-"ciples, it must depend for its validity upon strict con-"formity to the statute."

In Sibley vs. Smith, in the 2nd Mich., it is said: "Such "statutes being in derogation of the common law, and "authorizing proceedings the effect of which is to divest a "citizen of his title to real estate, although it may be for "the good of the public, must be construed strictly. And "their provisions can be enforced no further than they are "clearly expressed. The Auditor-General can take no "power that is not expressly granted to him; he can as-"sume no power by implication, and when his acts are not "clothed by the authority of the statute they are of no "validity."

In the City of Detroit vs. Putnam, 45 Mich., 263 (Cooley, Campbell, Graves and Marston), "Where a statute at-"tempts in derogation of the common law to create a lia-"bility we cannot go beyond the clear expressed pro-"vision of the act. Such statutes are not to be extended or "enlarged in their scope by construction."

In Sheldon vs. Erskine, 78 Mich., 627, there was a provision of the statute providing for a decree for deficiency on foreclosure of a mortgage; the question came up where there were several holders of debts secured by the same mortgage, and as the statute did not provide for such a case, it was held that there being no provision for separate personal decrees of separate complainants, that the necessarily strict construction of the statute deprived them of the remedy contemplated by the statute. Says the Court: "The reasons are not material if there is no law providing "for this specific remedy. The statute, which transfers "to a court of equity, jurisdiction to give judgments be-"longing to the common law cannot be enlarged by con-"struction."

It may be said in passing that the statute here referred to provided for a judgment for a deficiency after foreclosure, also provides specifically for an execution for the deficiency. (Sec. 6702.)

The same holdings as to judgments in the Circuit Court in statutory proceedings in garnishment. (Maynards vs. Conwell, 3 Mich., 312; Sievers vs. Woodburn Co., 43 Mich., 275; Ford vs. Detroit, 50 Mich., 358.) In 82 Mich., 169, Wilson et al. vs. Reilly, Cir. Judge, it was provided by statute that certain proceedings might be taken against a defendant residing in another State. The statute did not provide in terms for more than one defendant, although the intention to do so was plain (and the statute was afterwards amended in accordance with that intent), but the Court held that no provision was made for cases where there was more than one defendant, and said: "We are "asked by counsel for respondent to construe the section "of the statute under which the proceedings were taken as "though it read, 'The principal defendant or *defendants or* "'*either of them* was a non-resident.' We do not feel au-"thorized to interpolate those words into the statute, but

"must leave that for the Legislature, if it chooses to so en-"large the statute."

The following cases are under the law providing that suits may be commenced by attachments. There has been no departure from the holding of the courts under such statutes since the decision from the earliest cases down.

In Greenvault vs. Bank, 2 Doug., Mich., 498, the Court said: "What then was the character of the Court and the "nature of the jurisdiction it exercised in suits of attach-"ment? The Circuit Court was a court of common law "jurisdiction in both civil and criminal cases. Its gen-"eral powers are clearly defined by statute. It was, in "other words, a court of superior jurisdiction. Do pro-"ceedings in attachment fall within the circle of the gen-"eral powers conferred upon the Circuit Court by statute? "They clearly do not. The jurisdiction in this respect is "special and extraordinary. The mode of proceeding is "peculiar and in derogation of common law."

Again, in Buckley vs. Lowrie, 2 Mich., 419, as to attachment proceedings, *"They do not derive their efficacy from the "general powers of the Court. The Court can act only under "the specially limited powers granted by the statute, and ac-"cording to its limited form of procedure."*

To the same effect Tannahill vs. Tuttle, 3 Mich., 104; Roelofson vs. Hatch, 3 Mich., 277; Brigham vs. Egglinton, 7 Mich., 291. In the last case with reference to the statute the Court said: "The whole attachment law being special, "the jurisdiction created being entirely statutory, and "such power must be confined within its legitimate ap-"pointed limits."

To the same effect King vs. Harrington, 14 Mich., 532; Matthews vs. Densmore, 43 Mich., 461; Millar vs. Babcock, 29 Mich., 525; Van Norman vs. Judge, 45 Mich., 204.

In the last case reference is made to a provision of the statute in attachment cases for the levy of execution on capital stock in a corporation, under a statute. The Court says: "In such circumstances the process of a "court of common law is powerless. The property is be- "yond its scope. Its statutory analogy is only capable of "applying when the interest is found standing as the prop- "erty of the debtor. The statute has made no provision "seizing under an attachment against one a share that be- "longs prima facie to another as an expedient to enable "the attaching creditor to contest the title of the apparent "owner, and as before suggested, the remedy is dependent "upon the statute, and not to be in any wise enlarged by "construction." In that case, too, the Legislature by another statute had assumed that the power to levy existed, but it was held that the assumption without express enactment worked no change in the law. See also in attachment cases: Jaffray et al. vs. Jennings, 101 Mich., 516; Borland vs. Kingsbury, 65 Mich., 59; Langtry vs. Judges, 68 Mich., 451; Drake vs. Lake Shore R. R., 69 Mich., 168.

The same principle is considered and held with strictness as to proceedings under miscellaneous statutes in the following cases: Dickinson vs. Von Wormer, 39 Mich., 14; Thurston vs. Prentiss, 1 Mich., 194; Craig vs. Butler, 9 Mich., 23, 24; Smith vs. Superintendents, 34 Mich., 56; Chicago R. R. vs. Sturgis, 44 Mich., 538; Bank vs. Potts Co., 92 Mich., 351; Newson vs. Hart, 14 Mich., 232; Hasceig vs. Tripp, 20 Mich., 216; Kowalka vs. Common Council, 73 Mich., 322; Lay vs. City, 75 Mich., 438, Singer Co. vs. Cullaton, 90 Mich., 639; Lantis vs. Reithmiller, 95 Mich., 47.

It may be said in closing under this caption, that if anything were wanting to show the tendency of the State

court to depart radically from the settled rules of jurisprudence in this case only, it may be found in the opinion of one of the majority in 92 Mich., at p. 58, where he finds authority for a Circuit Judge to grant new trials before another jury in condemnation cases, in the statute providing as to references of causes in courts of record, that the Court may "*discharge any referee on cause shown*" *and fill vacancies in the number of referees.* (How., § 7379, Sec. 5.)

The plaintiffs in error submit on this record that the judgment of the Supreme Court of Michigan must be reversed and the proceedings after the first award vacated.

DON M. DICKINSON,

Of Counsel for Plaintiffs in Error.

No. 55.

Add'l Brf. of Dickinson for P. E

Filed Jan. 20, 1898.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 55.

ABSALOM BACKUS, JR., AND A. BACKUS, JR., & SONS (A CORPORATION), PLAINTIFFS IN ERROR,

vs.

THE FORT STREET UNION DEPOT COMPANY.

ERROR TO SUPREME COURT OF MICHIGAN.

Some Commentaries on the Opinion of the Supreme Court of Michigan in Union Depot Co. vs. Backus, 92 Mich., 33.

DON M. DICKINSON,
Of Counsel for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1-20-'98

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 55.

ABSALOM BACKUS, JR., AND A. BACKUS, JR., & SONS (A CORPORATION), PLAINTIFFS IN ERROR,

vs.

THE FORT STREET UNION DEPOT COMPANY.

ERROR TO SUPREME COURT OF MICHIGAN.

Some Commentaries on the Opinion of the Supreme Court of Michigan in Union Depot Co. vs. Backus, 92 Mich., 33.

I.

At page 37 of that opinion the following statement appears:

"We permitted in the present appeal a re-argument of that question for the reason that should we find we were then in error neither party will have lost any substantial right, as all the questions then presented are now before us for re-

view, and this court, under the statute, possesses ample power to correct any errors which may be found in the record and proceedings. The motion for *mandamus* was argued before us at the October term last, and such consideration was not given it then as the interests now involved in the controversy demand. We have now listened to a re-argument of the question then passed upon, and our attention has been called to several decisions, from which we conclude that the powers of the circuit courts in this class of cases were too much restricted by the former opinion."

Here is an essential error of fact. There was no re-argument of the question permitted in the sense that counsel for the plaintiffs in error here had any notice that an argument would be required or expected in a case decided by a unanimous bench at the previous term.

(*a.*) No re-argument was ordered or suggested in accordance with the rules of jurisprudence and the decisions of the supreme court of the State. (See Rec., p. 1831, bottom.)

(*b.*) A statement of the errors of fact was presented in the *petition for certiorari*, considered and allowed by the court (see this Record, p. 1804, top), and again therein fully presented (p. 1806, fol. 3023), and presented again in the assignment of errors in the State court (XXXIII,* p. 1815), and argued in that court.

(*c.*) The supreme court gets its jurisdiction to issue the common-law certiorari from the State constitution (Specht *vs.*

* It will be seen that by misprinting from some other place in the State record the three lines between the opening words of this assignment "In this" and the word "because" have been erroneously inserted and are foreign.

Detroit, 20 Mich., 171). Therefore, like the King's Bench, it may review errors like this in its own proceedings *coram nobis;* and to get before the court the question in regard to its own proceedings on the face of the papers reviewed by the court in allowing the writ, the questions are to be set out substantially in accordance with the requisites of a bill of exceptions. (Knapp *vs.* Gamsly, 47 Mich., 377.)

Statements in an application for certiorari not contradicted in the return are thus to be taken as true. (Wilson *vs.* Township, 87 Mich., pp. 240, 248; and see our main brief on certiorari, p. 21.)

The statement in the opinion as above quoted that "the motion for mandamus was argued before us at the October term last, and such consideration was not given it then as the interests now involved in the controversy demand," is erroneous, as shown by the record, for on the mandamus proceeding the return of the circuit judge below, printed in this record between pages 878 and 929, covers the same matter precisely and every authority cited, reviewed, and passed upon in 92 Mich., 33. They were passed upon, as shown, too, by the exhaustive opinion of the court, in the mandamus case in Backus *vs.* Gartner, 89 Mich., 209.

II.

(*a.*) There is not an authority cited in the opinion in 92 Mich., pages 38 to 41, from the Michigan supreme court, which sustains the conclusions of the court as to the power of the circuit judge to grant a new trial. They are simply to the conceded point that he may *vacate* the award.

(*b.*) The authorities cited to the point from other States, as shown by a complete citation of all the authorities in Michigan in our main brief, are inapplicable because of the radical difference in the constitutions of those States from the constitution of Michigan in respect of the questions discussed. Such authorities cannot be used to controvert the construction of the constitution and laws of Michigan, as held uniformly by the supreme court of Michigan itself, so as to bind this court or sustain the error complained of against the construction of the State court itself, standing unreversed (and cited by it in this opinion as not intended to be reversed) that *do* bind this court.

III.

At page 43 of the opinion it is said that no substantial injustice had been done. In respect of these plaintiffs in error, this cannot be true, for the reason that in the change of the rule laid down in the mandamus case we were deprived of a hearing on the proposed change, and directions were sent back to the circuit judge for a retrial, with our right to a plenary appeal to the State supreme court cut off by the statute itself from the result of a second trial below, and, more important still, were sent back to that circuit judge with power vested in him for further new trials without right of plenary appeal from his action in any of them.

IV.

The main ground of the reversal against the plaintiffs in error is set out at the bottom of page 47 and extending to page 55 of the 92 Mich. Manifest errors of fact, and errors going to the jurisdiction as reflecting upon counsel and disposing of their clients' interests (if they were denied a hearing), appear in this discussion; they are fully treated of in our main brief, beginning at page 67.

The practice and rights on certiorari (if allowed) to show error in the Supreme Court's own proceedings are pointed out under caption I, *supra*.

The point was raised at every stage of the proceedings and is carefully set out in the sworn application for the writ of certiorari in this record, at page 1804, and again in the same application, at page 1806, folio 3023. (Note clerical error in the sixth line from the bottom, page 1806, where the word "without" should plainly read "after," as at page 1804.) It was again presented in the assignment of errors in the State court, under XXXIII, page 1815, where the correction heretofore referred to as to the first three lines should be made.

V.

The taking of property without just compensation is shown in the opinion, 92 Mich., at page 55, where the rule as applied by the circuit judge as to valuation of one part of the plant by itself without regard to the injury to the business or to the remainder of the plant is adopted in direct violation, not only of the universal rule of just compensation, but of that rule applied by the State court itself as to other

citizens, both before and after the judgment complained of, as shown in our main brief, commencing at page 58. The Supreme Court of the United States will "inquire whether the trial court prescribed any rule of law for the guidance of the jury that was in absolute disregard of the fixed right to just compensation" (166 U. S., p. 246). This the trial court below did, as shown at pages 60 and 61 of our main brief, and he did it in the charge which is quoted in the judgment of the State court which comes here (this Record, 1782, folio 2980): "The land described in the petition" was the land only on which the factory stood.

VI.

One of the concurring majority of the court in the 92 Mich., at page 57, states that the chief justice in the case in 89 Mich. referred to analogous proceedings in confirming reports in the case of referees in common-law courts, and he proceeds to sustain the majority view for the reversal of the mandamus judgment by citing (p. 58) section 7379, Howell's Statutes, as authority for the circuit judge to grant new trials in confirmation cases, and says of it:

"It cannot be doubted that under this section the circuit judge might, upon a showing that the referees were prejudiced or biased, discharge one or all of such referees and refer the same to new referees to be appointed by him."

The section referred to is from the procedure in common-law courts of record on references for accountings, &c., and we respectfully ask that the section cited by the learned justice be read.

VII.

In the opinion in 92 Mich., at page 36, the supreme court of the State quotes the *charge* made as to a juror. The court does not refer to it as a cause for reversal in any place, or show forth any evidence in support of it, nor does it refer to the complete exposure of the charge, as shown in this Record, at page 936 *et seq.*

In actions before a struck jury of business men, in which other active business concerns with whom they do business were engaged, the current course of business and payment of bills cannot be suspended. Even the circuit judge does not presume to refer to this subject in his reports to the Supreme Court.

Neither does the supreme court of the State refer to the fact that *after* agreeing upon their verdict, after four hours' deliberation and late at night, the jury sent out for a luncheon to be taken, including some *pint* bottles of lager beer (Rec., pp. 874 *et seq. et ante.*), although the circuit judge did send up to the supreme court for the record before them in the 92 Mich., 33, the statement that it had been *alleged* that while "deliberating upon their verdict" the jury "surreptitiously" obtained twelve *quarts* of beer. (Rec., p. 929.)

There was not even any justification for this certification in that extraordinary return of Judge Gartner, for no one had made any charge or hint as to twelve *quarts* of beer.

We are not prepared to concede even that it would be wrong for twelve gentlemen to drink a quart of beer each at supper after they had found a verdict and escaped jury duty; but a *pint* of beer—that is different; and we contend,

even vigorously, that a man may consume *half* a quart of beer, if taken with a substantial meal, without appreciable injury to his physical, intellectual, or moral well being, or to the accuracy of his perception of his proper duty to the Law and the Social Order. A quart might go to the jurisdiction—a pint never; and so it seemed to have appeared, in juridical contemplation, when counsel pointed out that Judge Gartner's return was doubly erroneous, in respect of the beer consumed by the juror Tribunal of the State constitution.

DON M. DICKINSON,
Of Counsel for Plaintiff in Error.